

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

77-2142

United States Court of Appeals
FOR THE SECOND CIRCUIT

MICHAEL FERRARA,

Petitioner-Appellant,

v.

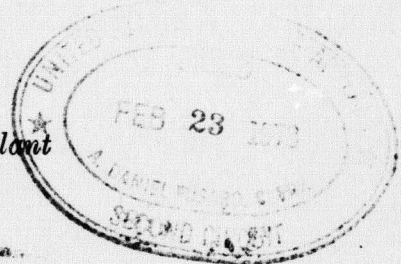
UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK

APPENDIX

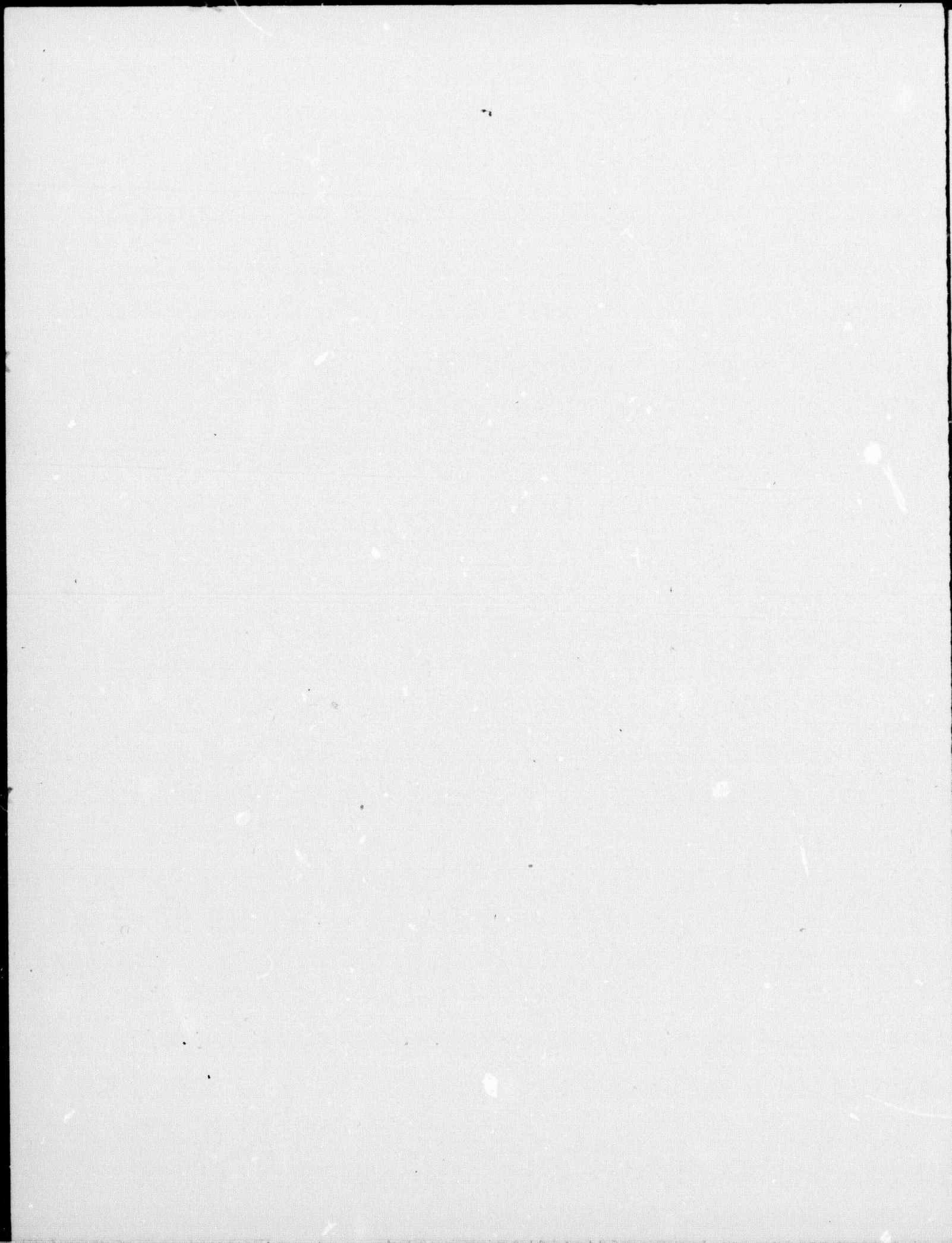
ROBERT AUGUSTUS HARPER, JR.
Attorney for Petitioner-Appellant
735 East University Avenue
Post Office Box 804
Gainesville, Florida 32602
904-377-0735



PAGINATION AS IN ORIGINAL COPY

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1a
Docket Entries

JUDGE/MAGISTRATE 0720 District Office	U.S. vs. 76 CR 100 (LAST, FIRST, MIDDLE) MICHAEL FERRARA -1	Case Filed Mo 3 Day 15 No of Defs 1	PLATT, 76-4 76 19
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U.S. TITLE/SECTION 18-2113(a)(d)	OFFENSES CHARGED Bank robbery and use of dangerous weapon	ORIGINAL COUNTS 2	U.S. MAG. CASE NO. 76 BAIL - REL 76
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CLOSED

AMT Denied Set 100,000 Date ☐ Bail Not Made ☐ Status Changed (See Docket)	☐ Convicted ☐ Acquitted ☐ Dismissed
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II. KEY DATES & INTERVALS			
ARREST or U.S. Custody Began 3/9/76 Summons Served First Appearance 3/9/76	INDICTMENT High Risk Date 3-15-76 Indict. Waived In Charging District Superseding Indict/Info 9/23/76	ARRAIGNMENT 3-19-76 1st Plea 7/23/76 Final Plea 10/5/76 - guilty Cts 1 & 3 of Superseding	TRIAL Trial Set For Voir Dire Trial Began Trial Ended

Search Warrant Issued Return Summons Issued Served Arrest Warrant Issued COMPLAINT OFFENSE (In Complaint)	DATE 3/9/76 VAC/070AX Armed Bank Robbery - T. 18 USC Sec. 2113(a)(d)	INITIAL/NO INITIAL APPEARANCE DATE 3/9/76 PRELIMINARY EXAMINATION OR REMOVAL HEARING Date Scheduled 3/11/76 Date Held ☐ WAIVED ☐ NOT WAIVED ☐ INTERVENING INDICTMENT	OUTCOME: ☐ DISMISS ☐ HELD FOR GJ OR OTHER PCEEDING IN THIS DISTRICT ☐ HELD FOR GJ OR OTHER PCEEDING IN DISTRICT
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U.S. Attorney or Asst. **Samuel Dawson, Esq.**

ATTORNEYS Defense ☐ CJA ☒ Ret. ☐ Waived ☐ Self ☐ None ☐ Other ☐ PO ☐ C

Michael F. Coiro, Esq.
118-18 Union Tpke., Kew Gardens, NY 1141
261-3142

* Show last names and suffix numbers of other defendants on same indictment information

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE
3/9/76		Arraignment - AUSA Dawson - D.C. Michael Coiro, Esq. 118-18 Union Turnpike, Kew Gardens, NY 261-3142(Ret) Hearing March 19, 1976 at 2:00 P.M. BAIL APPLICATION - March 11, 1976 at 2:00 P.M.	(a) (b)
3/15/76		DEFT. INDICTED - SEE 76 CR 190 Before Mishler, Ch J.	
3-19-76		Notice of Appearance filed.	
3-19-76		Before PLATT, J - case called - deft & counsel M. Coiro present - deft arraigned and after being advised of his rights enters a plea of not guilty - defts motion for reduction of bail argued - decision reserved pending hearing on security of bail - Bail set at \$112,000 secured by deeds to houses - adjd to May 7, 1976 to set trial date.	
3-22-76		Notice of Readiness for Trial filed.	
4-23-76		76 M 607 inserted in CR file	
5/7/76		Before PLATT, J. - Case called - deft and counsel present - case adj to 6/4/76 at 10:00 A.M.	

Docket Entries

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER
7/5/76					
7-13-76					
7/23/76					
7/23/76					
9/3/76					
9/13/76					
10-1-76					
10/5/76					
12-10-76					
1-11-77					
1-11-77					
1-17-77					
4/27/77					
5-24-77					

Before PLATT, J. - Case called. Deft & counsel Present. Status Report set down for 7/13/76 at 9:30 a.m.

Before PLATT, J - case called - status report set down for 7-23-76

SUPERSEDING INDICTMENT FILED.(S).

Before PLATT, J. - Case called. Deft & Counsel present. Deft waives reading of the superseding indictment & enters a plea of not guilty. After having been advised of his rights by the Court, and on his own behalf, Deft waives all rights under the Speedy Trial Act. Status Report set down for 9/3/76 at 10:00 a.m. Trial set down for 9/7/76 at 9:30 a.m. Bail is continued as to superseding Indictment.

Before PLATT, J. - Case called. Trial set down for 9/13/76 at 9:30 a.m.

Before PLATT, J. - Case called. Counsel present. Trial set down for 10/1/76 at 10:00 a.m. or in the alternative 10/4/76 at 10:00 a.m.

Before PLATT, J.-Case called-Trial set down for 10-5-76 at 9:30 AM.

Before PLATT, J.- Case called. Deft & Counsel present. Deft after being advised of his rights by the Court, and on his own behalf, withdraws his plea of not guilty and enters a plea of guilty to counts 1 and 3 of Superseding Indictment. Sentence adjd without date. Bail (\$100,000 Surety). continued.

Before Platt, J.- Case Called. Deft. & Counsel present. Deft's motion for adjdmt argued and granted. Sentence set down for 12-17-76 at 2:00 P.M.

Before Platt, J - case called - deft & counsel M.Coiro present - deft sentenced on counts 1 and 3 to imprisonment for a term of 18 years and to become eligible for parole under 18:4205(b)(2) and to pay a fine to the U.S. in the sum of \$5,000; total fine of \$10,000. On motion of AUSA Kimelman the remaining counts and the underlying indictment is ordered dismissed.

Judgment and commitment filed - certified copies to Marshal.

Certified Copy of Judgment and Commitment returned and filed from Marshal. Deft. delivered on 1-11-77 to M.C.C., New York.

By Platt, J Order dtd 4/27/77 filed re that deft's motion for reduction and/or modification of sentence, pursuant to Rule 35, is denied. JLJ and letter filed dated 4-18-77 considered as a motion for reduction of sentence imposed, (received from Chambers)

Transcript filed dated Oct. 5, 1976.

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

Deputy Clerk

Docket Entries

MICHAEL FERRARA

76

190

1

Yr.

Docket No.

Def.

PROCEEDINGS (continued)

V. EXCLUDABLE DELAY

DATE	(Document No.)	(a)	(b)	(c)	(d)
7/7/77	Notice of motion pursuant to T.28 USC Section 2255 for vacation of prison sentence. Papers and file forward to chambers.]l]				
7-19-77	By Platt, J - Order to show cause filed re 2255 motion Service of a copy of Order to be made by the Clerk together with copy of the Petition to the US Atty and mailing a copy of this order to the petitioner.				
8-5-77	Govts Memo of Law filed in response to motion of deft to withdraw a guilty plea.				
8-25-77	Petitioners reply to Govts Memo of Law filed in opposition to motion to withdraw guilty plea and Motion for special appearance of counsel filed and certificate of service.				
9-20-77	By Platt, J- Memorandum and Order filed denying defts motion to vacate, set aside or correct the sentence previously imposed upon him. Copies mailed to the deft, Robert Harper and AUSA Kimelman.				
9-26-77	Motion for Rehearing filed (forwarded to Chambers)				
10-4-77	Affidavit of M. Ferrara filed. mg				
10-13-77	By PLATT, J - Memorandum and order filed granting application to allow counsel Robert Augustus Harper, Jr. to appear for petitioner pro hac vice, and also for a rehearing on issues raised in counsels reply to Govts Memo of Law in opposition to withdrawal of plea of guilty. Court adheres to its original decision of 9-20-77.				
11-17-77	Notice of appeal filed.				
11-17-77	Record on appeal certified and mailed to the c of a				

A TRUE COPY ATTEST

11/17/77

LEWIS JORGEL

CLERK

BY

DEPUTY CLERK

4a
Indictment

RJD:SHD:mt
F. 761,022

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

★ MAR 15 1976 ★

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TIME A.M.
P.M.

----- X

UNITED STATES OF AMERICA

I N D I C T M E N T

- against -

MICHAEL FERRARA,

Defendant.

Cr. No. _____
(T. 18, U.S.C., §§2113(a) and
(d))

----- X

76 CR 190

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 3rd day of September 1974, within the Eastern District of New York, the defendant MICHAEL FERRARA knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Roosevelt Savings Bank, located at 156-08 Crossbay Boulevard, Queens, New York approximately Fourteen Thousand, Seven Hundred and Ninety Six Dollars (\$14,796.00), in United States currency, which money was in the care, custody, control, management and possession of the said Roosevelt Savings Bank the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Section 2113(a)).

COUNT TWO

On or about the 3rd day of September, 1974, within the Eastern District of New York, the defendant MICHAEL FERRARA knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the

Indictment

Roosevelt Savings Bank, approximately Fourteen Thousand, Seven Hundred and Ninety Six Dollars (\$14,796.00), in United States currency, which money was in the care, custody, control, management and possession of the said Roosevelt Savings Bank the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation and in commission of this act and offense the defendant MICHAEL FERRARA did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of a dangerous weapon. (Title 18, United States Code, Section 2113(d)).

A TRUE BILL.

James P. Wamsler, deputy
FOREMAN

David G. Trager
DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

Superseding Indictment

TRP:SK:rd
F# 763,021

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

JUL 23 1976

TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
UNITED STATES OF AMERICA

-against-

MICHAEL P. FERRARA,

Defendant.
----- X

SUPERSEDING INDICTMENT

Cr. No. 76 CR 190 (S)
(T. 18, U.S.C. §§2113(a),
2113(d) and 2)

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 3rd day of September, 1974, within the Eastern District of New York, the defendant MICHAEL P. FERRARA knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Roosevelt Savings Bank, 158-08 Cross Bay Boulevard, Howard Beach, Queens, New York, approximately Fourteen Thousand Seven Hundred and Ninety-Six Dollars (\$14,796.00), in United States currency, which money was in the care, custody, control, management and possession of the said Roosevelt Savings Bank the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Section 2113(a) and Section 2).

COUNT TWO

On or about the 3rd day of September, 1974, within the Eastern District of New York, the defendant MICHAEL P. FERRARA knowingly and wilfully, by force, violence, and

Superseding Indictment

intimidation, did take from the person and presence of employees of the Roosevelt Savings Bank, 158-08 Cross Bay Boulevard, Howard Beach, Queens, New York, approximately Fourteen Thousand Seven Hundred and Ninety-Six Dollars (\$14,796.00), in United States currency, which money was in the care, custody, control, management and possession of the said Roosevelt Savings Bank the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation and in the commission of this act and offense the defendant MICHAEL P. FERRARA did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of a dangerous weapon. (Title 18, United States Code, Section 2113(d) and Section 2).

COUNT THREE

On or about the 2nd day of December, 1974, within the Eastern District of New York, the defendant MICHAEL P. FERRARA knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Chase Manhattan Bank, 241-10 61st Avenue, Queens, New York, approximately Seven Thousand Four Hundred and Forty-Three Dollars (\$7,443.00), in United States currency, which money was in the care, custody, control, management and possession of the said Chase Manhattan Bank the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Section 2113(a) and Section 2).

Superseding Indictment

COUNT FOUR

On or about the 2nd day of December, 1974, within the Eastern District of New York, the defendant MICHAEL P. FERRARA knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Chase Manhattan Bank, 241-10 61st Avenue, Queens, New York, approximately Seven Thousand Four Hundred and Forty-Three Dollars (\$7,443.00), in United States currency, which money was in the care, custody, control, management and possession of the said Chase Manhattan Bank the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation and in the commission of this act and offense the defendant MICHAEL P. FERRARA did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of a dangerous weapon. (Title 18, United States Code, Section 2113(d) and Section 2).

A TRUE BILL

Nicholas L. Ferro
FOREMAN

David G. Trager
DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

Pro Se Motion for Correction of an Illegal and Erroneous
Sentence Pursuant to Rule 35 Federal Rules of Criminal
Procedure.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN NEW YORK

MICHAEL FERRARA
PETITIONER

V.

CR. NO.'S 76 CR. 190
&
CR. 76-471: ORIGINAL

UNITED STATES OF AMERICA
RESPONDENT

MOTION FOR CORRECTION OF AN ILLEGAL
AND ERRONEOUS SENTENCE PURSUANT TO-
RULE (35) FEDERAL RULES OF CRIMINAL
PROCEDURE: FOR VIOLATIONS OF RULE -
11 AND THE CONSTITUTION OF THE UNI-
TED STATES OF AMERICA (BUT NOT LIM-
ITED THERETO) i.e., (AMONG OTHERS).

AND:

MOTION TO WITHDRAW PLEAS OF GUILTY IN/OF
THE ABOVE CAPTIONED CASES

TO THE HONORABLE, THOMAS C. PLATT, UNITED -
STATES DISTRICT JUDGE, UNITED STATES
DISTRICT COURT U.S. COURTHOUSE
BROOKLYN, NEW YORK

Pro Se Motion

Comes now, Michael P. Ferrara, Petitioner in the above captioned cause, (hereinafter referred to as your movant), who first being duly sworn, under oath, according to law, deposes and says:

Your Movant, would most respectfully represent unto this Honorable Court: Your movant is a layman and not well versed in the law, and brings this instant motion in pro se, as such this said Court is respectfully requested to apply the standards set-out by the Supreme Court in HAINES V. KERNER, 414 U.S. 519, and further this said Court is requested to cure any defects in the jurisdiction/laws in this said case, pursuant to Rule (8)-f of the Federal Rules of Civil Procedure and UNITED STATES V. GLASS, 317, F.2d 200, 202 (4th Cir. 1963); WRIGHT V. DICKSON, 336 F.2d 878, 881 (9th Cir. 1964); PRICE V. JOHNSON, 334, U.S. 266, 292 (1948): Whereupon, the herein submitted pleadings be so construed as to do substantial justice.

Movant respectfully represents, that the "Plea and Sentencing transcripts" in this instant case reflect the inadequacy of the Trial Court and the U.S. Attorney to reach sound findings in excepting the pleas in this instant case as specifically set out in Rule (11) of the Federal Rules of Criminal procedure.

Pro Se Motion

See e.g., Transcript of Rule (11) hearing dated October 5, 1976 i.e., Page (12) thereof wherein, at lines 10 thru 18 Exhibit (A) annexed hereto the defendant advises the Court that in fact some prediction's had been made as to the sentence which might be imposed by the Court, however, here the Court having been advised, that "wide prediction's" had been represented to him, when asked by the Court, the Court continued on to sentence movant without ever having gone into the "wide predictions" which were represented to movant as to what movant might expect in return for his entering a plea of guilty. Movant respectfully represents that here in this instant case, "nonresponsive Counsel" placed movant in a position which violated movants right to due process of law including equal protection by not advising the Court, that in fact Counsel of Record had represented unto movant that, movant would receive less time than his alleged co-defendant, further, your movant is aware of the fact, that in effect, a guilty plea blocks collateral attacks unless the defendant-movant can show he pleaded guilty on the advice of counsel who did not perform within the range of competence demanded of attorneys in criminal cases, see Parker V. NORTH CAROLINA, 397 U.S. 790, 797 (1970); McMANN V. RICHARDSON, 397 U.S. 757, 770-71 (1970); BRADY V. UNITED STATES, 397 U.S. 742, 757 (1970). See also SANDERS V. CRAVEN, 488, 479-80 (9thCir. 1973), i.e., "Claim of denial of effective counsel should be considered by district court where attorney failed to

Pro Se Motion

appeal). Which your movant contends is applicable in this instant case, where Counsel of record was cognizant of the fact, that he had advised movant to plead guilty, for the before said lesser sentence then that of movants alleged Co-Defendant, e.g., See movants affidavit as to Counsel having advised movant as to the before mentioned annexed hereto as "Exhibit (B)". In addition thereto, Counsel of record advised movant to answer: (NO) as to the Courts question: "BUT HE HASNT MADE ANY PREDICTION WHAT SENTENCE WILL BE IMPOSED" and as such Counsel enhanced the denial of movants rights under Rule (11), leaving the record silent as to Counsels having reached an agreement with the U.S. Attorney as to a lesser sentence for your movant then that of the alleged Co-Defendant, and further denied movant the right to appeal the said violations herein.

Movant further respectfully represents: Because Rule (11) of the Federal Rules of Criminal Procedure does not currently require disclosure of any plea bargain when defendant enters his guilty plea, courts have faced difficult problems in attempting to adjudicate post-conviction allegations that a plea bargain has been broken; often, the record contains no evidence of the alleged bargain. See Fed. R. Crim. P. 11. Proposed amendments to rule 11, of the Federal Rules of Criminal Procedure, would require the trial court to order full disclosure of any plea bargain in open court at the time the plea is offered. See proposed amendments to the Federal Rules of Criminal Procedure,

Pro Se Motion

for the United States District Courts, rule 11(e) (2), in 42 U.S.L.W. 4551, 4552 (U.S. Apr. 23, 1974). Further it is respectfully represented that, the Third Circuit holds that a petitioner is entitled to an evidentiary hearing on his allegation that his guilty plea was induced by an unfulfilled plea bargain, even though the record shows he denied the existence of any bargain to the trial judge when entering the plea, UNITED STATES V. VAL-ENCIANO, 495 F.2d 585, 587-88 (3d Cir. 1974); see e.g., ROBERTS V. UNITED STATES, -- F.2d -- (5th Cir. Nov. 12, 1973) (No. 73-2450 at 6); HILLIARD V. BETO, 495 F.2d 35 (5th Cir. 1974) (per curiam); SWANSON V. ESTELLE, 492 F.2d 115, 117-18 (5th Cir. 1974); UNITED STATES V. GONZALEZ-HERNANDEZ, 481 F.2d 648, 650 (5th Cir. 1973) (per curiam)... Also see BRYAN V. UNITED STATES, -- F.2d -- (5th Cir. Apr. 4, 1974) (No. 72-2127, at 2300-01) (petitioner not entitled to hearing on claim that plea bargain breached where he and his counsel denied to judge that a bargain existed). See also MOODY V. UNITED STATES, 497 F.2d 359, 362 (7th Cir. 1974) (no hearing required on petitioners "bare-bones" inconsistent allegation that plea bargain was broken); PARADISO V. UNITED STATES, 482 F.2d 409, 412 (3d Cir. 1973) (no hearing required where petitioners guilty pleas were induced not by prosecutors promise but by counsel's estimate of sentence.. However, in this instant case as above set out, the Court was advised by petitioner-movant that Counsel of record had made predictions as to the term being less than that of his alleged co-defendant.

Pro Se Motion

Movant respectfully brings to light, that numerous Circuits hold that, to avoid the difficulty of reconciling a defendants denial of the existence of a plea bargain before sentencing with his post-sentencing allegation that a secret bargain was breached, four circuits ordered Federal District Courts to question the defendant and counsel for both sides about the existence and terms of any plea bargain. BRYAN V. UNITED STATES, Supra., MOODY V. UNITED STATES, Supra., UNITED STATES V. GALLINGTON, 488 F. 2d 637, 640 (8th Cir. 1973), cert. denied, 416 U.S. 907 (1974); PARADISO V. UNITED STATES, Supra... Movant respectfully further represents that in this instant case, the trial court failed to make the above mentioned inquiries to counsels for either side, even though, movant had informed the court that infact "wide preditions" had been made by counsel of record.

Your Movant in this instant case, further respectfully represents (under oath), that the plea entered in the instant case was to a (3) three count indictment, however, the plea was entered due to the threats by the U.S. Attorney by/through counsel of record that, the Government would otherwise seek (18) charges of which movant was not guilty, yet movant being placed in fear by the threats i.e., that the government would seek "the longest prison term possible, if movant chose to go to seperate trials on all charges and was found guilty on any one charge movant was tried for, movant feared to seek due-process of law and entered a plea to charges, movant was not guilty of committing.

Pro Se Motion

Movant would further, most respectfully represent: The Sentencing Transcripts in this instant case reflects the reluctance of the U.S. Attorney to afford movant equal protection of law, in that, it is an excepted common practice within legal circles, to feel that a defendant pleading guilty is repentant and as such rehabilitation starts its process. However, here we find a U.S. Attorney who, at the time of sentencing would taint the decorum of the Court, in that, after excepting an agreement to a plea on a (2) count indictment/indictments stating that at the time of sentencing other alleged charges would be dropped and then the said U.S. Attorney, at the time of sentencing stipulates to further alleged charges i.e., (18) other bank robberies which your movant was not guilty of and had no knowledge of said (18) robberies Supra., and the U.S. Attorney further notes for the record, that the Court had agreed to a deal in the instant case pursuant to Rule (11) e., of the Fed. R. Crim. P., in the case of an Alleged Co-Defendant, (Savich), which should be applicable to your movant, and requests the Court to sentence (in essence) for the alleged (18) bank robberies, and not to the agreed (3) counts your movant pleaded guilty to having committed in fear of the very punishment which movant received. See e.g., Exhibit (C), i.e., Pages (7) thru (9) of sentencing transcripts annexed hereto, wherein, it is further evidenced, that the U.S. Attorney, as well as the Court sentenced movant for (18) alleged bank robb-

Pro Se Motion

eries and not simply the (3) counts movant had agreed to plead guilty to and further added a cumulative fine of 15,000.00 dollars to movants sentence of (25) years imprisonment.

Your movant, respectfully further represents, that he is aware of the fact that, non-responsive counsel of record in advising movant as to answers to give going to the Courts Rule (11) hearing seemingly aided the prosecution in obtaining the develish type sentence which was imposed, in that, counsel advised your movant to respond, and say that "He understood" the Rule (11) questions of the Court leaving movant "in a quandry" and "suffering on the horns of a dilemma".. However, your movant respectfully represents: That the Court failed to advise your movant, that upon excepting movants plea to the (3) count indictment Supra., that at the time of sentencing, the Court would sentence your movant for the (18) Bank Robberies which movant was not indicted for and had no knowledge of, and did not plead guilty to committing.

Movant further, respectfully points out that in this instant case, having pleaded not guilty to the original charge and indictment, the record is silent as to the Rule (11) hearing as to the Court informing your movant, that movant was entitled to severence and seperate trials on all alleged (18) bank robberies had he chose to maintain his-movants plea of not guilty, for it is common knowledge that 12 interlectual giants could not weigh an evaluate the evedence presented in an (18) count indictment, however, and

Pro Se Motion

upon the word of counsel of record and feeling that he-movant would infact be granted a lessor sentence as stated by movants counsel of record (see affidavit i.e., Exhibit B.,) annexed hereto, movant retracted his "original" plea of "not guilty" and entered a plea of guilty to charges he-movant was not in any form guilty of committing. Which constitutes a sentence predicated upon an uninformed Court i.e., a Court not having a full knowledge of the underlying coercive method used to obtain the guilty plea from this unlearned layman saddled with a non-responsive counsel.

Your movant would further most respectfully represent: The Federal Bank Robbery Act., 18 U.S.C. § 2113 (1970), devotes (5) seperate subsections to various criminal acts that often accompany a robbery attempt Id., 18 U.S.C. § 2113 (a) (robbery from bank personnel: entry with intent to rob): Id., 18 U.S.C. § 2113 (b) (1970). (larceny); Id., 18 U.S.C. § 2113 (c) (possession of robbery proceeds); Id., 18 U.S.C. § 2113 (d) (1970) (robbery and assault with dangerous weapon); Id., 18 U.S.C. § 2113 (e) (1970) (robbery and murder or kidnapping).... Never-the-less, the Supreme Court has decided that bank robbers who violate several subsections during one holdup cannot receive cumulative sentences: HEFLIN V. UNITED STATES, 358 U.S. 415, 419-20 (1959) (robbery and possession of proceeds); PRINCE V. UNITED STATES, 352 U.S. 322, 322, 328-29 (1957) (robbery and entry with intent to rob).

18a
Pro Se Motion

Expanding on the Supreme Courts view, the Ninth Circuit in United States V. Faleafine, 492 F.2d 18 (9th Cir. 1974) (en banc) concluded that a kidnapping that is part of a bank robbery does not constitute a seperate offense but merely enhances the single sentence that can be given under the Act. Id., at 24-25; accord, SULLIVAN V. UNITED STATES, 485 F.2d 1352, 1354 (5th Cir. 1973) (seperate sentences, although concurrent, held illegal), where the indictment improperly contains multiple charges under the Act, but the sentence imposed is a general one not specifying a seperate sentence for each count and the sentence's length does not exceed the maximum allowable under the properly charged subsection, the sentence will stand. See JOHNSON V. UNITED STATES, 495 F.2d 652, 653 (8th Cir. 1974) (per curiam). In cases where the trial Judge erroneously set several sentences under the Act, the question arises whether the sentence for any particular violation would have been different if the judge had realized that only one sentence could be given. Thus, when an appellate court finds that cumulative sentences have been given illegally, the court must decide whether to vacate all sentences and remand to the trial court for resentencing on the proper count, or to vacate only the illegal sentence and sustain the sentence on the most aggravated count accord SULLIVAN Supra., in FALEAFINE, Supra., which involved consecutive sentences, the court of appeals vacated only the illegal extra sentence 492 F.2d at 26. The Fifth Circuit, confronted with concurrent sentences, also vacated only the illegal sentence, SULLIVAN, Supra., at 1354-55 (1973); accord UNITED STATES V. MASON, 492 F.2d 1241 (4th Cir. 1974) (No.-

Pro Se Motion

73-1955) (unpublished opinion) The Sullivan Court based its holding on theories that the trial judge would not wish to alter the remaining sentence and that double jeopardy possibly precluded an upward re-evaluation. The ~~Third~~ Circuit vacated all sentences in UNITED STATES V. JASPER, 481 F.2d 976, 979 (3d Cir. 1973). However, in Jasper, the defendant not only filed a motion challenging the multiple sentences, but also filed a motion attacking as involuntary his "guilty plea" to all counts. Thus the validity of all the sentences remained in doubt until the additional motion was resolved, *Id.*, at 978. Whether the Third Circuit would vacate all sentences when properly prosecuted count was not under attack is uncertain... See also: U.S. V. LINDSAY, 552 F.2d 202 (S.A. ILL 1977). erroneous imposition of 2 sentences for single offense does not constitute double jeopardy, but when it occurs, sentence on one of the offenses must be vacated, even if sentences are concurrent, because of possibility of adverse collateral consequences from erroneous imposition of concurrent sentences i.e., applicable in this instant case where the Court in sentencing movant under indictment 76-CR-190-(s) the Court, imposed on the first count (18) years, and a cumulative fine of \$5,000.00. And on count two of the same indictment 76-CR-190-(s) the Court again imposed a second sentence of (18) years and still another added cumulative fine of \$5,000.00. And in addition thereto, on indictment 76-CR-471 the Court imposed an additional consecutive sentence of (7) years adding still another cumulative fine of \$5,000.00, for a total of \$15,000.00 in cumulative fines, which goes be-

Pro Se Motion

yond any shadow of a doubt that the sentences imposed upon your movant are illegally imposed and predicated upon and uninformed Court.

CONCLUSION:

Your movant in conclusion would most respectfully request and move this Esteemed and Honorable Court to vacate the sentence imposed in this instant case setting aside the judgement and conviction and to allow your movant to withdraw his plea of guilty and to plead anew i.e., enter his original plea of not guilty and to be granted the right to be tried by jury/juries of his peers.

PRAYER:

Wherefore, and for all of which your movant will ever pray, that this Honorable Court grant this motion pursuant to Rule (35) of the Federal Rules of Criminal Procedure, whereby Justice prevail and the law of equity be served:

SWORN & SCRIBED TO BEFORE ME

THIS 27 DAY OF JUNE, 1977

RESPECTFULLY SUBMITTED BY

Michael P. Ferrara
MICHAEL P. FERRARA
MOVANT-PRO-SE

J. Fowles
NOTARY
Public in Florida Authorized by the Act of
July 7, 1965 to Administer Oaths (18 U.S.C.
4906).

Certificate of service annexed hereto.

21a
Pro Se Motion

EXHIBIT - 12

2 ments will be dismissed?

3 THE DEFENDANT: No, Your Honor.

4 THE COURT: Have any promises of any kind, includ-
5 ing any promises or suggestions as to what sentence will
6 be imposed been made by your lawyer or by this Court, or
7 by anyone else to induce a plea of guilty from you?

8 THE DEFENDANT: No, Your Honor.

9 THE COURT: Has your lawyer expressed any opinion
10 or made any prediction as to what sentence the Court
11 will impose?

12 THE DEFENDANT: Predictions?

13 THE COURT: Yes?

14 THE DEFENDANT: Not really. Really wide predic-
15 tions.

16 THE COURT: But he hasn't made any prediction
17 what sentence will be imposed?

18 THE DEFENDANT: No.

19 THE COURT: Have you been threatened or coerced
20 by anyone into entering a plea of guilty?

21 THE DEFENDANT: No.

22 THE COURT: Are you pleading guilty voluntarily
23 and of your own free will because you are guilty and
24 for no other reason?

25 THE DEFENDANT: Yes, Your Honor.

Pro Se Motion

Exhibit-B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN NEW YORK

UNITED STATES OF AMERICA

v.

76-CR-471
76-CF-190 (S)

MICHAEL P. FERRARA

AFFIDAVIT:

STATE OF GEORGIA)
 (SS/
COUNTY OF FULTON)

Before me the undersigned authority came, Michael P. Ferrara, who first, being duly sworn, (under oath), according to law, deposes and says:

(1): That Michael P. Ferrara, is your affiant herein, and submits this affidavit of his own free will, and has not been threatened or promised anything for submitting same.

(2): Affiant states further, that the purpose of this instant affidavit is to support the annexed motion to correct an illegal sentence pursuant to rule (35) of the federal Rules of Criminal Procedure and in the interest of justice being served.

Pro Se Motion

Page two of affidavit i.e., Affiant Michael P. Ferrara.

(3): Affiant states further, that on or about October, 1976, therein thereof, Counsel of Record in the above captioned cause i.e., Michael Goiro, Esq., did place affiant in a state of fear, and confusion of be-subjected to the awesome power of the United States Prosecutor to wit: If affiant chose to plead "not guilty" (as affiant had pleaded in the above captioned), that, the U.S. Attorney would seek to gain the same sentence as was imposed upon an alleged co-defendant i.e., (Savich), in the above captioned criminal cases, and would at all costs have affiant proven guilty and sentenced to over (60) years.

(4): Affiant states further, that prior to and during the period of time that affiant had his original plea of not guilty before the court, Counsel of record advised affiant as follows: That although Counsel had advised affiant to plead not guilty and that the evidence against affiant was insufficient to support a conviction, that he-Counsel had after talking with the U.S. Attorney, that he now had a plea bargain agreement with the U.S. Attorney handling the Government's case to a sentence of less time than that of an alleged Co-Defendant i.e., (Savich), said agreement being that: Affiant would receive far less time than that of the (25) years that alleged Co-Defendant (Savich), had received.

(5): Affiant states further, that Counsel of Record informed affiant that he had become aware that the government claimed to have had "fingerprints" on a piece of paper found in an alleged bank robbery that were those of affiants, yet it was not at the time disclosed to affiant that the said

Page three of affiants i.e., Affidavit Michael P. Ferrara.

(ALLEGED FINGERPRINTS), were those taken from the very bank which your affiant conducts his own banking business, and as such very possible that affiants "fingerprints" could have been found in said bank.

(b); Affiant states further, that the plea of guilty entered in the above captioned by your affiant, was induced by coerced methods by the U.S. Attorney, by/through non-responsive counsel of record in the above captioned criminal causes and that Affiant herein states that the plea bargain as represented to affiant by counsel of record was broken and affiant was not, is not guilty as charged, convicted and sentenced in the above captioned causes.

SWORN & SUBSCRIBED TO BEFORE ME

RESPECTFULLY SUBMITTED BY

THIS 27 DAY OF JUNE, 1977

Michael P. Ferrara
MICHAEL P. FERRARA
AFFIANT PRO-SE

J. Frowles
NOTARY Public in the State of
New York (3 U.S.C.)

Exhibit-C.

that Your Honor be as merciful as you possibly 7
can.

THE COURT: Do you wish to say something,
Mr. Ferrara?

THE DEFENDANT: Yes, Your Honor. I feel that
what Mr. Coiro said is definitely the truth. I
could never tell you how sorry I am for what I have
done. I know I am going to go and pay for it, and
I am going to try to do the best I can, wherever you
want to send me for the time I do.

THE COURT: Mr. Kimmelman?

MR. KIMMELMAN: Yes, Your Honor. Your Honor,
as part of the agreement with the Defendant to enter
the plea, the United States indicated on the record
that we would ask Your Honor to impose consecutive
sentences upon this Defendant.

As Your Honor knows, this is an unusual
position for the Government. We don't normally take
a position at a sentencing, but in this particular
case we have a defendant who with his co-defendant,
who already pled guilty, Mr. Savage and accepted a
plea agreement of 25 years, which was agreed to also
by Your Honor, we have an individual here where the
Government had evidence that he has committed --

THE COURT: I'm going to interrupt you. I

Pro Se Motion

don't recall agreeing to anything. I said 8
I would accept the plea and determine the sentence
independently.

MR. KIMMELMAN: I understand that, Your
Honor. But pursuant to Rule 11(e), the Court
technically went along with it, in any event, with
the agreement.

THE COURT: I thought Rule 11, not 11(e).

MR. KIMMELMAN: All right. But anyway, this
Defendant, rather than the Government, has evidence,
both scientific evidence and evidence of eyewitnesses
that this Defendant participated in 18 bank robberies
going from April of 1973 to January of 1976. This
indicated a concentrated and a continuing enterprise.

Each of the bank robberies were an armed
bank robbery. The total amount of money taken in
the bank robberies exceeded a half a million dollars.
None of the money has been recovered.

This Defendant has not in any shape or form
cooperated with the Government. There's been no
cooperation, neither as to the whereabouts of the
money, the existence of any possible accomplices
other than Mr. Savage and himself, and in short,
we have a Defendant who embarked on a three year
crime scheme of armed robberies, throughout this

district, with another individual, and then 9
ends up pleading to 3 out of the 18 banks in a plea
agreement which obviously takes in cognizance that
18 banks were robbed and only 3 are being pled to
and we have no cooperation and no recovery of the
funds.

It's the position of the Government, Your
Honor that this Defendant be sentenced to a minimum
of 25 years imprisonment, that he is at least as
culpable as his co-defendant with whom that the
Government reached an agreement of 25 years, and
that we would ask, therefore, that the minimum
sentence to be considered by Your Honor be 25 years,
and we would not feel that a sentence in excess of
25 years would be too severe in this case, as well.

MR. COIRO: Judge Platt, may I just briefly,
sir?

THE COURT: Yes.

MR. COIRO: Judge Platt, Mr. Kimmelman makes
reference to Mr. Savage. Your Honor sentenced Mr.
Savage, and I think that Your Honor will be able to
recall the background of Mr. Savage as compared to
the background of Mr. Ferrara, and Judge, again --
please, I'm not minimizing that which he's done, but
his background, Judge, this man, because of his

Order to Show Cause Filed on July 19, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
MICHAEL P. FERRARA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.
-----x

7600190
No. (77 C 1408)

ORDER TO
SHOW CAUSE

Upon the petition for relief under 28 U.S.C. §2255
dated June 27, 1977, a copy of which is attached,
it is ORDERED that:

(1) The United States Attorney for the Eastern District of New York show cause before this Court why the relief requested should not be granted, by the filing of a return to the petition;

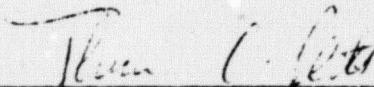
(2) Within twenty (20) days of receipt of this order the United States Attorney shall serve a copy of his return on the petitioner herein and file the original thereof, with proof of such service, with the Clerk of this Court;

(3) If the transcript of the trial be available, the United States Attorney is directed to submit such transcript and record to this Court at the time of the filing of such return;

(4) Petitioner, within ten (10) days of the receipt by him of a copy of the return of the United States Attorney, shall file his reply, if any, in duplicate, with the Clerk of this Court;

Order to Show Cause

(5) Service of a copy of this order shall be made by the Clerk of this Court by delivery of a copy thereof, together with a copy of the petition, to the United States Attorney, and by mailing a copy of this order to the petitioner.



U. S. D. J.

Dated: Brooklyn, New York
July 13, 1977

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ JUL 15 1977 ★

TIME A.M.
P.M.

Government's Memorandum of Law and Response to
Motion to Withdraw a Guilty Plea, not Dated.

SK:sd
F.#

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

MICHAEL FERRARA,

Petitioner

77 C 1408
76 CR 190(S)
76CR 471

- against -

UNITED STATES OF AMERICA,

Defendant.

- - - - - X

GOVERNMENT'S MEMORANDUM OF
LAW IN RESPONSE TO MOTION
TO WITHDRAW A GUILTY PLEA

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

STEVEN KIMELMAN
Assistant U.S. Attorney
(Of Counsel)

Government's Memorandum of Law and Response to
Motion to Withdraw a Guilty Plea, not Dated.

PRELIMINARY STATEMENT

On March 15, 1976, petitioner Michael Ferrara entered a plea of not guilty to a two count indictment (76 CR 190) charging him with armed bank robbery. On September 23, 1976, the United States superseded with a four count indictment (76 CR 190(S)), as well as with a new six count indictment (76 CR 471). Petitioner also pleaded not guilty to these additional charges.

On October 5, 1976, Ferrara withdrew his previously referred to pleas of not guilty and entered guilty pleas to the first and third counts of superseding indictment 76 CR 190(S) and to the first count of the indictment 76 CR 471. Each of these counts charged a violation of Title 18, United States Code, Section 2113(a). In exchange for his guilty plea, the United States agreed to dismiss the remaining counts of the outstanding indictments.

On January 11, 1977, petitioner was sentenced to a total of eighteen years on Counts One and Three of indictment 76 CR 190(S) and seven consecutive years on Count One of indictment 76 CR 471. Fines totalling fifteen

Government's Memorandum of Law

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thousand dollars were also imposed. Petitioner now seeks a hearing to withdraw his guilty plea and correct his sentence under Rule 35 of the Federal Rules of Criminal Procedure. Three grounds are alleged. First, petitioner claims that his plea was the result of a false representation of counsel, that he would receive a lesser sentence than his co-defendant Savage. Second, petitioner alleges that his plea was coerced by threats of additional prosecution by the United States. Third, and finally, Ferrara states that the consecutive sentences imposed are illegal.

Although petitioner has asked for relief pursuant to Rule 35 of the Federal Rules of Criminal Procedure, this Court has apparently chosen to treat the instant pro se petition as one made under Title 28, United States Code, Section 2255. Because of the expiration of the 120 day period specified in Rule 35, the United States' response will also treat the instant petition as if it had been made pursuant to Section 2255.

POINT ITHE PETITIONER WAS NOT COERCED
INTO ENTERING GUILTY PLEA

Petitioner now argues that his guilty pleas were coerced because his counsel had advised him that if he did not plead guilty, the United States was ready to prosecute petitioner for a total of 18 bank robberies. A review of the minutes of petitioner's plea and sentencing on October 5, 1976 and January 11, 1977, (Government Appendix) demonstrates the baselessness of petitioner's claim.

First of all, on October 5, 1976, petitioner responded to Your Honor that he was pleading guilty voluntarily, of his free will and without coercion (Government Appendix P. 12). Second, petitioner admitted in some detail his participation in the three bank robberies covered by his plea (Government Appendix P. 9-11). Third and finally, on January 11, 1977, Your Honor noted in sentencing petitioner that petitioner had admitted participating in 12 of the 18 bank robberies alleged by the Government (Government Appendix P. 28).

Government's Memorandum of Law

4.

Petitioner's self admitted participation in 12 armed bank robberies is clear evidence that on the advice of experienced counsel he pleaded guilty to avoid certain convictions and exposure to literally hundreds of years of imprisonment. This example of plea bargaining by the petitioner neither violates due process nor is inherently coercive. Indeed, the established standard in establishing coercion on a guilty plea is whether the defendant was subjected to either threats or promises of illegitimate actions on the part of the United States; Ford v. United States, 418 F.2d 855 (8th Cir. 1969). Petitioner's plea therefore was simply a realization by petitioner and his counsel that conviction on three counts was better than conviction on twenty-four to thirty-six counts. Nothing in petitioner's moving papers suggests otherwise. The claim of coerciveness is therefore deficient on its face and should be dismissed.

Government's Memorandum of Law

5.

POINT II

PETITIONER'S GUILTY PLEA WAS NOT
INDUCED BY A FALSE PROMISE AS TO
WHAT HIS SENTENCE WOULD BE

Petitioner also alleges that he pleaded guilty because of assurances of his counsel that he would receive a lesser sentence than his co-defendant, Savage. The record of the petitioner's plea on October 5, 1976 does not support his claim:

THE COURT: Have any promises of any kind, including any promise or suggestion as to what sentence will be imposed, been made to you by anyone in the United States Attorney's Office, other than at the time of sentence the remaining counts of these two indictments will be dismissed?

THE DEFENDANT: No. Your Honor.

THE COURT: Have any promises of any kind, including any promises or suggestions as to what sentence will be imposed been made by your lawyer or by this Court or by anyone else to induce a plea of guilty from you?

Government's Memorandum of Law

6.

THE COURT: Has your lawyer expressed any opinion or made any prediction as to what sentence the Court will impose?

THE DEFENDANT: Predictions?

THE COURT: Yes?

THE DEFENDANT: Not really, Really wide predictions.

THE COURT: But he hasn't made any prediction as to what sentence will be imposed?

THE DEFENDANT: No.

(Government Appendix P. 11-12).

The above stated colloquy is clear and unequivocal. It suggests that petitioner's present claim of a "secret agreement" between his counsel and the United States Attorney is a recent and desperate fabrication.

Petitioner also seems to suggest that the mere fact that his counsel made "wide predictions" as to sentencing is enough to void his plea. It is well settled, however, that an erroneous sentence estimate by defense counsel does not render a plea involuntary. In United

7.

States ex. rel. Bullock v. Warden, Westfield State Farm for Women, 408 F.2d 1326, (2d Cir. 1969), cert. denied, 396 U.S. 1043 (1970), the Court states:

Petitioner's allegation that Seligman promised a "light sentence" and parole after 2 1/2 - 3 1/2 years was first made at the coram nobis hearing held after Seligman's death. Her letter to the court which led to the hearing asserted only that Seligman had told her that she would be "at the mercy of the court" and would receive "less time." Moreover, at the hearing she admitted that her only complaint was that she had received a longer sentence than Seligman told her she had reason to expect. On the basis of this full and fair hearing the court found that Seligman had made an "estimate" and not a promise concerning the sentence. Its finding is clearly supported by the record and should be accepted by the court. 28 U.S.C. §2254(d) (Supp. III 1965-67); Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L. Ed. 2d 770 (1963). An erroneous sentence estimate by defense counsel does not render a plea involuntary. See United States v. Horton, 334 F.2d 153, 155 (2d Cir. 1964) (motion under 28 U.S.C., §2255 (1964). (408 F.2d 1326, 1330).

Petitioner's unsubstantiated allegations that he was promised a lesser sentence than his co-defendant are not supported by either accompanying affidavit of

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Government's Memorandum of Law.

8.

his attorney or the record of his Rule 11 plea before
Your Honor. These allegations therefore do not warrant
further consideration and should be dismissed.

POINT III

CONSECUTIVE SENTENCING OF
PETITIONER WAS PROPER

Petitioner claims that consecutive sentences are prohibited under Title 18, United States Code, Section 2113. His claim is frivolous because it is based on a misstatement of the applicable law. Consecutive sentences are indeed illegal upon conviction of more than one offense for the same bank robbery. It is equally clear however, that consecutive sentences are not barred upon conviction from several bank robberies. Petitioner's consecutive sentences are based upon his conviction for three separate violations of Section 2113(a), involving three different banks. His petition on this point should therefore be dismissed.

POINT IVPETITIONER IS NOT ENTITLED TO A
HEARING UPON THIS PETITION

As indicated above, all of petitioner's allegations are meritless on their face. In particular, his allegations of a "secret deal" between his counsel and the United States Attorney that he would receive a lesser sentence than his co-defendant Savage are flatly contradicted by the record. The claims presented therefore do not suggest any errors in the Rule 11 proceeding which would constitute "a fundamental defect which inherently results in a complete miscarriage of justice" Hill v. United States, 368 U.S. 424, 428 (1962).

Government's Memorandum of Law

11.

CONCLUSION

The petition should therefore be denied in all respects without further proceedings.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

STEVEN KIMELMAN
Assistant U.S. Attorney
(Of Counsel)

Motion for Special Appearance of Counsel

MICHAEL FERRARA

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ AUG 25 1977 ★

TIME A.M. :
P.M. :

Case No. 76-CR-190-S
76-471

Treated as Civ. 77C1408

MOTION FOR SPECIAL APPEARANCE OF COUNSEL

COMES NOW, the Defendant, MICHAEL P. FERRARA, by and through undersigned counsel and hereby moves this honorable Court to allow undersigned counsel to appear on behalf of the Defendant/Petitioner herein in any and all subsequent proceedings in special appearance capacity, or until undersigned counsel avails himself of the procedures of the Local Rules of Court and otherwise becomes a member of the Bar of the Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to David G. Trager, United States Attorney, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, by hand/mail this 17 day of August, A.D., 1977.

Respectfully submitted,


ROBERT AUGUSTUS HARPER, JR.
Counsel for Defendant/Petitioner
735 East University Avenue
P.O. Box 804
Gainesville, FL 32602
904/377-0735

Petitioner's Reply to Government's Memorandum of Law

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK

MICHAEL FERRARA

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

:

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Case No.

76-CR-190-S

76-471

Treated as Civ. 77C1408

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ AUG 25 1977 ★
TIME A.M. _____
P.M. _____

PETITIONER'S REPLY TO
GOVERNMENT'S MEMORANDUM OF LAW
IN OPPOSITION TO MOTION TO WITHDRAW
PLEA OF GUILTY

ROBERT AUGUSTUS HARPER, JR.
Counsel for Defendant/Petitioner
735 East University Avenue
Post Office Box 804
Gainesville, FL 32602
904/377-0735

Petitioner's Reply

INTRODUCTION

The accuracy and truth of a prisoner's disavowal of any threats at his arraignment are "conclusively" established by that proceeding unless and until he makes some reasonable allegation why this should not be so. *Crawford v. United States*, 519 F.2d 347, 350 (4 Cir. 1975). It is not enough for the prisoner merely to challenge the voluntariness of his plea. He must also allege sufficient facts to raise an issue about the validity of his arraignment. It is a dual requirement. *Edmonds v. Lewis*, 546 F.2d 566 (4 CA 1976).

While a mere self-serving affidavit alleging circumstances with which the trial judge should be familiar does not require an evidentiary hearing, *United States v. Curry*, 497 F.2d 99, 101 (5 CA), cert. denied, 419 U.S. 1035, 95 S.Ct. 519, 42 L.Ed.2d 311 (1974), when the record discloses other credible documentary evidence which indicates a right to relief, an evidentiary hearing may be necessary, *Dugan v. United States* 521 F.2d 231 (5 CA 1975). *Vandenades v. U.S.*, 523 F.2d 1220 (5 CA 1975).

Petitioner's Reply

**A. DEFENDANT/PETITIONER WAS NOT PLACED
UNDER OATH AT REARRAIGNMENT AS REQUIRED
BY RULE 11**

In U.S. v. Aldridge, 553 F.2d 922 (5 CA 1977), the Fifth Circuit reaffirmed the mandatory requirement of placing the defendant under oath.

Second, Aldridge was not placed under oath until he had responded to numerous questions and his plea had already been accepted. This court's construction of Rule 11 requires that the defendant be under oath for the entirety of the proceedings. See, Bryan v. United States, 492 F.2d 775, 781 (5 CA), cert. denied, 419 U.S. 1079, 95 S.Ct. 668, 42 L.Ed.2d 674 (1974). U.S. v. Aldridge, supra at 922-923.

The record of change of plea, 5 October 1976, shows complete abrogation of this procedure.

**B. CONDUCT OF COUNSEL ALLEGATIONS OF
COERCION AND SENTENCE PREDICTIONS**

Whether a waiver of constitutional rights is effective is an issue governed by federal standards. *Boykin v. Alabama*, supra 395 U.S. at 243, 89 S.Ct. 1709. A plea of guilty embodies the waiver of several constitutional rights, including the right against self-incrimination, the right to confront one's accusers and the right to a trial by jury. *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). The strong presumption is against the validity of waivers of constitutional rights, and the acceptance of a plea of guilty must be approached with the utmost solicitude. *Von Moltke v. Gillies*, 332 U.S. 708, 723, 68 S.Ct. 316, 92 L.Ed. 309 (1948); *Knight v. State of Minnesota*, 484 F.2d 104, 106 (8 CA 1973). The record must affirmatively show, under the totality of the circumstances, that the plea of guilty was voluntary, and it is the duty of the judge to establish by inquiry as thorough as the circumstances demand its constitutional validity. *Boykin v. Alabama*, supra 395 U.S. at 242, 89 S.Ct. 1709; *Von Moltke v. Gillies*, supra 322 U.S. at 723-724, 68 S.Ct. 316; *Smith v. Wolff*, 506 F.2d 556, 560 (8 CA 1974). *Griffith v. Wyrick*, 527 F.2d 109 (8 CA 1975).

At arraignment, Mr. Ferrara was asked whether there was any other understandings or commitments by the government. He responded negatively. It has been held that even where the answer to such an inquiry denies the very existence of a plea bargain, it is not to be considered conclusive against such

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Petitioner's Reply

claim. The real possibility that fear that a truthful response might jeopardize the bargain may well produce an answer that is false. *Crawford v. United States*, 519 F.2d 347 (4 CA 1975); *Walters v. Harris*, 460 F.2d 988 (4 CA 1972), at 992, cert. den. 409 U.S. 1129; *U.S. v. Hammarman*, 528 F.2d 326 (4 CA 1975).

A 'mere prediction by counsel of the court's likely attitude on sentence, short of some implication of an agreement or understanding, is not ground for attacking a plea. *Domenica v. United States*, 292 F.2d 483, 485 (1 CA 1961). Defendant alleges that his counsel purported to speak on behalf of the United States Attorney;

that "a 'working agreement' had been formulated by the defense counsel and the United States Attorney and that said agreement was breached and disavowed by both parties concerned."

See *Machibroda v. United States*, 368 U.S. 487, 489, 82 S.Ct. 510, 7 L.Ed.2d 473. Even if no "working agreement" existed in fact, the voluntariness of defendant's guilty plea would be seriously in question if it was induced by representations of counsel that such an agreement was in effect. See, *United States ex rel. Thurmond v. Mancusi*, 275 F.Supp. 508, 516 (E.D.N.Y. 1967). *McAleney v. U.S.*, 539 F.2d 282 (1 CA 1976).

The public and the courts are seriously burdened when because of the avoidable errors of counsel, defendants are relieved from guilty pleas. Here the allegation has been made that the accused was misinformed by his privately retained counsel as to what the Assistant United States Attorney had said. Either

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Petitioner's Reply

the mistaken information was transmitted wilfully or incompetently - in which case the attorney's continued license to practice in the district court must be carefully considered - or else there were extenuating circumstances which, in fairness to counsel, should be made known. There is also to be entertained the possibility of perjury and collusion aimed at upsetting the original sentence. See, *McAleney v. U.S.*, supra at 286.

It is urged for the benefit of counsel against whom the representation have been raised and to preserve the dignity of this Court, a hearing be had as in *U.S. v. Corbitt*, 541 F.2d 146 (3 CA 1976), at 149:

We have concluded that, under the unusual facts of this case, the trial court should have secured different counsel for Corbitt as the result of the disclosures on July 16 and should have had Mr. Herman testify as to exactly what he had said to Corbitt prior to the entry of a guilty plea on May 7, in order that the court could be in a position to determine whether this defendant was denied effective assistance of counsel under the standards set forth in *Moore v. United States*, 432 F.2d 730 (3 CA 1970). Although the record discloses substantial prejudice to the Government in permitting the withdrawal of the guilty plea on July 16 (N.T. 11-15), waiver of constitutional rights is not to be presumed. See, *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

C. LACK OF FACTUAL BASIS

The Court may review the record for compliance with Rule 11 even though Petitioner did not specifically raise the issue in his pro se Section 2255 petition. *United States v. Untiedt*, 479 F.2d 1265, 1266 (8 CA 1973); *Majko v. United States*, 457 F.2d 790, 791 (7 CA 1972).

In *U.S. v. Hilyer*, 543 F.2d 42 (8 CA 1976), the record disclosed that the court asked Hilyer if he was offering to plead guilty for any reason other than the fact that he was guilty, to which Hilyer replied no. The court specifically found that the guilty plea was made knowledgeably and voluntarily. The court also stated it found "that in his Answer to Question 35, in particular, the facts there would justify a finding of guilty as to Count I if the case were tried * * * ." Question 35 refers to the question "What acts did you do which cause you to think that you are guilty of the charge or charges to which you now want to plead GUILTY?" found in Hilyer's petition to enter a plea of guilty. To that question appeared this response:

with Darrell Bailey leaving Detroit, rode to
Blair Nebraska attempted to purchase license
plates with forged title.

It is evident from this response that the question still remained as to whether or not the title had traveled interstate in its forged condition. As it was stated in *United States v. Owens*, 460 F.2d 467, 469 (5 CA 1972):

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Petitioner's Reply

It is obvious that to prove the commission of an offense under this portion of section 2314 the Government must show that the instrument traveled interstate in its forged or altered condition.

It was concluded that the judge at the guilty plea proceeding did not adequately establish on the record that there was a factual basis for the plea as required by Rule 11. The sentence and guilty plea were vacated, and defendant allowed to plead anew.

In *Rizzo v. U.S.*, 516 F.2d 789 (2 CA 1975), Rizzo withdrew his previously entered plea of not guilty and entered a plea of guilty to Count Three of the indictment. At the plea proceedings, the District Court, after determining that Rizzo was ready to plea, asked the appellant if he wished to have the third count of the indictment read to him. Appellant's attorney stated that he would waive a reading of the indictment since he had read the third count a number of times and had discussed the indictment and the facts of the case with appellant. The judge then specifically asked the appellant if he wished the third could read to him. The appellant responded, "It does not have to be read to me. I don't contest the indictment at all."

The District Court then explored the voluntariness of Rizzo's plea and his understanding of the charge against him. In so doing, the judge paraphrased the indictment and outlined the consequences of a guilty plea.

The trial judge then asked Rizzo if he had committed the offense charged in the indictment. Essentially, Rizzo asserted that Calamaras was his "dear friend", that their friendship was of many years duration, that he, Rizzo,

Petitioner's Reply

had personally loaned Calamaras money and has also borrowed money on Calamaras' behalf, and that he had authorized Crispino and Marino to collect the debt from Calamaras. He denied any knowledge or condonation of the use of force in making the collection, but indicated that he still wished to plead guilty to the charge.

Rizzo's attorney then stated that his discussions with the prosecutor and his review of government tape recordings had satisfied him that there was no reason for the Court not to accept Rizzo's plea of guilty. The judge concluded the allocution by stating that he believed that Rizzo was "acting voluntarily and knowledgeably and that there was a basis in fact for the guilty plea."

On December 6, 1973, Rizzo was sentenced by Judge Frederick vanPelt Bryan to a twenty-year prison term on Count Three to run concurrently with previous sentences imposed by Judge Gagliardi and Judge Carter. Counts One and Two of the indictment were dismissed on appellant's motion at the time of sentence.

On October 17, 1974, Rizzo moved, pursuant to 28 U.S.C. §2255, to vacate his sentence and set aside the judgment of conviction. In an order filed on October 22, 1974, the Judge denied the motion without a hearing.

Count Three of the indictment charged Rizzo with violating 18 U.S.C. §1951. The elements of an offense under 18 U.S.C. §1951 are (1) interference with commerce in any way or degree and (2) extortion. See, e.g., *Stirone v. United States*, 361 U.S. 212, 218 80 S.Ct. 270 4 L.Ed.2d 252 (1960). Extortion

Petitioner's Reply

consists of "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. §1951(b)(2). The element of actual or threatened force or violence, or fear, is essential to the crime. See, e.g., *United States v. Billingsley*, 474 F.2d 63, 66 (6 CA), cert. denied, 414 U.S. 819 94 S.Ct. 42, 38 L.Ed.2d 51 (1973); *United States v. Tropiano*, 418 F.2d 1069, 1081 (2 CA 1969), cert. denied, 397 U.S. 1021, 90 S.Ct 1262, 25 L.Ed.1d 530 (1970); *United States v. Tolub*, 309 F.2d 286, 289 (2 CA 1962); *Nick v. United States*, 122 F.2d 660, 671 (8 CA), cert. denied, 314 U.S. 687, 62 S.Ct. 302, 86 L.Ed. 550 (1941). Yet, nowhere on the face of the record did this essential element of use of force, violence or fear appear.

Not only was a factual basis for the essential element of the threatened use of force, violence or fear entirely absent from the record, but the record pointed toward a contrary conclusion. Rizzo described Calamaras as "beyond the point of a casual friend" and "more or less like by father"; there is no admission on the record as to threats by Rizzo himself and although Rizzo admitted that he had requested Crispino and Marino to collect money from Calamaras, he vigorously asserted that "[h]ow they collected the money, I was unaware of it. I was unaware of Mr. Cr[i]spino ever threatening this man because I would never allow it and I was also unaware of Mr. Marino threatening this man." Thus, at the very moment of pleading Rizzo in effect negated his plea by his vehement denials of any knowledge of the use of threats of force and his

Petitioner's Reply

protestations that he would not allow such threats to be made against his "dear frient" Calamaras. As has been pointed out by the Fifth Circuit, a disclaimer of knowledge of an essential element of the crime "appears more closely akin to a protestation of innocence than [to] an expression of guilt." *Hulsey v. United States*, 369 F.2d 284, 287 (5 CA 1966). Here, as in *Hulsey*,

"[i]t would have been a simple matter for the trial court, when confronted with such equivocal response, to delay accepting the plea until further inquiry clearly established that the accused understood the elements of the crime charged . . . and that willing to enter an unequivocal admission of guilt." *Id.*

Similar equivocation appears in the record before the Court. (See, A-10-11).

In *Williams v. U.S.*, 393 F.Supp. 260 (D.C. MN 1975), Petitioner was a resident at the Federal Penitentiary in Marion, Illinois, seeking an order vacating and setting aside the plea of guilty entered by him to the charge of " . . . willfully and unlawfully and with felonious intent, take by force, violence, and intimidation . . . approximately \$39,000.000 belonging to and in the care, custody, control management and possession of the Western State Bank, a banking institution insured by the Federal Deposit Insurance Corporation; in violation of 18 U.S.C. Section 2113(a)."

When questioned as to whether the plea was voluntary, the defendant responded to questions of the court as follows:

Petitioner's Reply

The Court: "And Mr. Williams. Is Anybody forcing you to do this?"

Mr. Williams: "No."

The Court: "Or threatening you, or anything of that nature?"

Mr. Williams: "It all depends on what you call a threat, Your Honor."

The Court: "Well, I mean do you want to explain that? What do you have in mind?"

Mr. Williams: "To hurt something I love, I'd hurt myself."

The Court: "What?"

Mr. Williams: "Rather than to hurt something that I loved, I would hurt myself."

The Court: "But has anybody physically threatened you in connection with this?"

Mr. Williams: "No."

At no point in the transcript of the proceedings is there a record of the precise act or conduct of the petitioner which allegedly constituted his "Participation in the robbery." Cf. Williams v. U.S., supra at 263.

The case law is clear that a factual basis for accepting a guilty plea is not provided by requiring a defendant to admit to the conclusionary statements of the indictment or the information, United States v. Untiedt, 479 F.2d 1265 (8 CA 1973); or by acknowledgment of the elements of the offense and reiteration

Petitioner's Reply

of a guilty plea to those elements, *United States v. Davis*, 493 F.2d 502 (5 CA 1974); or by the reading of the indictment to a defendant, *United States v. Cody*, 438 F.2d 287 (8 CA 1971).

In the Untiedt case, the Court stated:

"The court . . . could have asked Untiedt to describe what he did or intended, or could have asked the government to outline its proof. As our Court stated in *United States v. Cody*, 438 F.2d 287, 289 (8 CA 1971), thorough judicial inquiry is required to determine that the elements of the offense were present, therefore establishing a factual basis for the plea. The inquiry which took place was far from thorough. The sentence and guilty plea must be vacated, and Untiedt must be allowed to plead anew." (emphasis added) 479 F.2d at 1266.

Petitioner's Reply

CONCLUSION

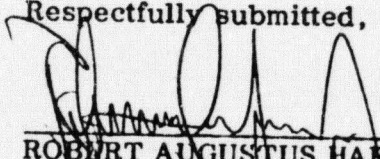
A hearing at least is required in the area of the representations and allegations concerning counsel received by Petitioner. If as the record indicated, Petitioner received no prediction as to the sentence, what prediction did he receive? Was Petitioner actually knowingly in consort with a weapon?

Finally, the Petitioner only now being under oath in allegations attacking his plea presents genuine claims. If for no other reason than the depth of inquiry and statements of the Court reflecting a concerted and genuine effort to perfect the Rule 11 record, such oversight is understandable on an obviously congested trial date, but should now be corrected by an evidentiary hearing as prayed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to David G. Trager, United States Attorney, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, by ~~hand~~/mail this 19 day of August, A.D., 1977.

Respectfully submitted,


ROBERT AUGUSTUS HARPER, JR.
Counsel for Defendant/Petitioner
735 East University Avenue
P.O. Box 804
Gainesville, FL 32602
904/377-0735

57a

Notice of Motion for Rehearing

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN NEW YORK

MICHAEL PERAZA
PETITIONER

V.

CR. NO.'S 76-CR-190-s
8:
CR. 76-471: ORIGINAL

UNITED STATES OF AMERICA
RESPONDENT

NOTICE OF MOTION FOR HEARING

TO THE HONORABLE, THOMAS C. PLATT, UNITED-
STATES DISTRICT JUDGE, UNITED STATES
DISTRICT COURT U.S. COURTHOUSE
BROOKLYN, NEW YORK

PLEASE TAKE NOTICE: That on the second hearing day in the month of July, 1977 Petitioner in the above captioned action through counsel and/or Pro-Se will request that the Clerk of this Honorable Court move this said Court that a hearing date be set in the above captioned matter for correction of sentence pursuant to Rule (35) Federal Rules of Criminal Procedure.

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Notice of Motion for Rehearing

SWORN & SUBSCRIBED TO BEFORE ME

THIS 27 DAY OF JUNE, 1977

RESPECTFULLY SUBMITTED

J. Fowles
Notary Public, State of New York
Parole Board, New York State Prison
Jail, New York State Prison, C.S.C.

Michael Ferrara
MICHAEL FERRARA

Petitioner's Affidavit dated September 26, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK

MICHAEL FERRARA

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

:

:

:

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Case No. 76-CR-190-S

76-471

Treated as Civ. 77C1408

FILED

U. S. DISTRICT COURT E.D. N.Y.



OCT 4 1977



TIME A.M.

P.M.

AFFIDAVIT

STATE OF GEORGIA

:

COUNTY OF FULTON

:

BEFORE ME this day personally appeared MICHAEL FERRARA,
who, being duly sworn, deposes and says:

1. I am the Petitioner in the proceedings above styled;
2. Robert Augustus Harper, Jr., Esq., has at all times subsequent to his appearance herein and immediately prior thereto, had my full consent in appearing in my behalf herein;
3. I further herewith adopt all acts and statements by said counsel as being made on and in my behalf.

Michael Ferrara
MICHAEL FERRARA

SWORN TO AND SUBSCRIBED before me this 26 day of September,
A.D., 1977.

Charles E. Miller
NOTARY PUBLIC

My Commission Expires:

Transcript of Proceeding

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ MAY 24 1977

TIME A.M. _____
P.M. _____

4 -----
5 UNITED STATES OF AMERICA,

6 Plaintiff,

7 -against-

No. 76 CR 190

8 MICHAEL FERRARA,

9 Defendant.

10 -----x

11 United States Court House
12 Brooklyn, New York

13 October 5, 1976
10:00 o'clock A.M.

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15
16 B e f o r e :

HONORABLE THOMAS C. PLATT, U.S.D.J.

17
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21
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23 RAYMOND P. STALKER
24 Court Reporter
25

Transcript of Proceeding

1 **Appearances:**

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4 For the Government:

5 DAVID G. TRAMER
6 United States Attorney
7 By Steven Kimmelman, Esq.

8 For the Defendant:

9 MICHAEL COIRO, ESQ.

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Transcript of Proceeding

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THE CLERK: Criminal cause for trial, United States of America versus Michael Ferrara.

THE COURT: Are you ready? I talked to Judge Weinstein this morning and he said, "He's all yours."

MR. COIRO: I'm all yours, Judge. Judge Platt, may we impose upon the Court for about ten minutes, fifteen minutes?

MR. KIMELMAN: I would say five minutes should be sufficient. We may have a disposition.

THE COURT: Oh, as soon as you get in my clutches--

MR. COIRO: I know, Judge.

MR. KIMELMAN: All I need is five minutes to consult with the United States Attorney.

THE COURT: All right. I'll take a few other cases.

MR. COIRO: Thank you, Judge Platt. I've got five minutes, thank you, Judge.

MR. KIMELMAN: We'll be back in five minutes.

THE COURT: All right.

(Short recess.)

(Whereupon, the Court resumed.)

MR. COIRO: If Your Honor pleases, this is an application on behalf of the defendant, Michael

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2 Ferrara to withdraw his plea of not guilty, heretofore
3 entered under indictment No. 76-CR-190(s) and to enter
4 a plea of guilty under the first count of that indict-
5 ment and under the third count of that indictment.

6 Further, if Your Honor pleases, to withdraw his
7 plea of not guilty heretofore entered under indictment
8 No. 76-CR-471 and to enter a plea of guilty under the
9 first count of that indictment.

10 THE COURT: Both these indictments were filed on
11 the same day?

12 MR. KIMELMAN: That's correct.

13 THE COURT: How did one get to be a superseding
14 indictment?

15 MR. KIMELMAN: There was an original indictment
16 back in March.

17 THE COURT: I'm looking at that.

18 MR. KIMELMAN: 190 is on one bank and the govern-
19 ment superseded on 76-CR-190 to make it a two bank
20 indictment and added three more banks onto 471.

21 THE COURT: I see. All right. Mr. Ferrara, your
22 counsel has indicated you wish to plead guilty to
23 three counts of these two indictments; before accept-
24 ing a plea of guilty from you I have to ask you certain
25 questions.

Transcript of Proceeding

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2 Now, as in all Court proceedings you do not have
3 to answer any of these questions. You may remain si-
4 lent throughout the proceeding. You do not have to
5 answer questions put to you by myself or by anyone else.
6 If you start to say something at any time you may stop.
7 Anything you say may be used against you in this pro-
8 ceeding or at some subsequent proceeding.

9 You may of course at any time consult with your
10 lawyer. You are entitled to counsel of your own
11 choice and if you cannot afford counsel the Court will
12 appoint counsel for you. You have, as I understand it,
13 retained Mr. Coiro as your attorney. But, as I in-
14 dicated you do not have to answer the questions that
15 I put to you and I have to put them to you before ac-
16 cepting a plea of guilty from you.

17 Have you been advised and do you understand that
18 you have a constitutional right to a speedy and public
19 trial by jury with the assistance of counsel?

20 THE DEFENDANT: Yes, I do.

21 THE COURT: And you have a constitutional right to
22 confront and cross-examine witnesses against you at that
23 trial?

24 THE DEFENDANT: Yes, I understand.

25 THE COURT: And at such a trial you have a right

Transcript of Proceeding

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2 to subpoenas or compulsory process to obtain witnesses
3 in your behalf?

4 THE DEFENDANT: I understand.

5 THE COURT: And at any such trial you have the
6 right not to incriminate yourself by being compelled
7 to testify at the trial. Do you understand that?

8 THE DEFENDANT: Yes, I do.

9 THE COURT: And you have the right to persist in
10 your plea of not guilty to all of the counts of both
11 of these indictments; do you understand that?

12 THE DEFENDANT: Yes, I do.

13 THE COURT: And in the event you persist in your
14 plea of not guilty the government would have the obli-
15 gation of proving your guilt beyond a reasonable doubt
16 on each count; do you understand that?

17 THE DEFENDANT: Yes, I do.

18 THE COURT: And if the government failed to do so
19 the jury would have the obligation to find you not
20 guilty on any count if they failed to do so; do you
21 understand that?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: Any or all. And do you understand
24 that if your plea is accepted you will be waiving your
25 constitutional right and a right to a trial?

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Transcript of Proceeding

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THE DEFENDANT: Yes, Your Honor.

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THE COURT: And do you understand that the Court
may ask you questions about the offense to which you
offer a plea; do you understand that?

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THE DEFENDANT: Yes.

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THE COURT: And I may put you under oath and if
your answers are false the answers may be used against
you in a prosecution for perjury or making false state-
ments; do you understand that?

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THE DEFENDANT: Yes, Your Honor.

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THE COURT: You understand that you will also have
the assistance of counsel at the time any sentence is
imposed if your plea is accepted.

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THE DEFENDANT: Yes, Your Honor.

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THE COURT: As you understand your counsel has
indicated you wish to plead guilty to three counts of
these two indictments?

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THE DEFENDANT: Yes, Your Honor.

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THE COURT: The first is a count which charges
that on September 3rd, 1974, you did knowingly and wil-
fully by force, violence and intimidation take from the
persons and presence of employees of the Roosevelt
Savings Bank on Cross Bay Boulevard, Howard Beach,
New York, approximately \$14,796, which money was

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2 in the care, custody, control, management and posses-
3 sion of that bank, the deposits of which bank were
4 then and there insured by the Federal Deposit Insurance
5 Corporation; do you understand that?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: Now, count three of that same indict-
8 ment charges that on December 22nd, 1974, by force,
9 you did knowingly and wilfully by force, violence and
10 intimidation take from the persons and presence of
11 employees of the Chase Manhattan Bank at 241-10 61st
12 Avenue in Queens, approximately \$7,443, which money
13 was in the custody of that bank, the deposits of which
14 were then insured by the FDIC; do you understand that?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: And count one of the other indictment
17 charges on October 17, 1975, you did knowingly and wil-
18 fully by force, violence and intimidation, did take
19 from the employees of the European American Bank in
20 Mineola approximately \$5,376, which was in the custody
21 of that bank, of which deposits of the bank were in-
22 sured by the Federal Deposit Insurance Corporation; do
23 you understand that?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: Now, in each of these instances do you

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2 understand that the government will have the obligation,
3 it will be required to prove beyond a reasonable doubt
4 that you knowingly and wilfully by force, violence or
5 intimidation take from the employees of each of these
6 banks the approximate amount of money specified in each
7 of the counts and prove that that money was in the
8 custody of the bank that the deposits of each bank
9 were insured by the Federal Deposit Insurance Company;
10 do you understand that?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: Now, bearing all that in mind did you
13 actually do what you are charged with?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: In each count?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: Did you do it knowingly and wilfully?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: Were you aware of what you were doing?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: And did you do it voluntarily and in-
22 tentionally?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: Tell me about the first alleged rob-
25 bery on September 3rd, 1974? That is the Roosevelt

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2 Savings Bank in Howard Beach, in Queens. Tell me what
3 you did, did you operate alone or did you operate with
4 somebody else?

5 THE DEFENDANT: Myself and another individual went
6 into the bank and asked the tellers for all the money
7 and I went around by the tellers and I took all the
8 money, put it in the bag and then we left.

9 THE COURT: Did you use any instruments or weapons?

10 THE DEFENDANT: No.

11 THE COURT: No or just verbal--

12 THE DEFENDANT: It was just a verbal agreement.

13 THE COURT: Now, in the case of the second indictment
14 on September 21st, 1974, tell me what you did in
15 that case? That is the Chase Manhattan Bank in Queens?

16 THE DEFENDANT: The same thing.

17 THE COURT: You and another man went in and asked
18 the tellers for the money and they gave you that amount
19 of money?

20 THE DEFENDANT: No, I had to take it.

21 THE COURT: You took it from the drawers?

22 THE DEFENDANT: Yes.

23 THE COURT: Approximately \$7,000?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: Then on October 17th, 1975, the

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Transcript of Proceeding

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2 European American Bank, do you remember that robbery?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: Same modus operandi?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: You and another person?

7 THE DEFENDANT: Yes.

8 THE COURT: And did you physically take that money,
9 some \$5,000?

10 THE DEFENDANT: Yes, I did, Your Honor.

11 MR. KIMELMAN: Your Honor, I might say for the
12 record that if the government went to trial in these
13 cases we would offer proof that a weapon was used by
14 the other individual with Mr. Ferrara in each of the
15 banks, a weapon was displayed.

16 THE COURT: But according to Mr. Ferrara at least
17 he didn't display the weapon.

18 MR. KIMELMAN: That's correct.

19 THE COURT: Is that correct?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: Have any promises of any kind, includ-
22 ing any promise or suggestion as to what sentence will
23 be imposed, been made to you by anyone in the United
24 States Attorney's Office, other than that at the time
25 of sentence the remaining counts of these two indict-

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Transcript of Proceeding

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2 ments will be dismissed?

3 THE DEFENDANT: No, Your Honor.

4 THE COURT: Have any promises of any kind, includ-
5 ing any promises or suggestions as to what sentence will
6 be imposed been made by your lawyer or by this Court or
7 by anyone else to induce a plea of guilty from you?

8 THE DEFENDANT: No, Your Honor.

9 THE COURT: Has your lawyer expressed any opinion
10 or made any prediction as to what sentence the Court
11 will impose?

12 THE DEFENDANT: Predictions?

13 THE COURT: Yes?

14 THE DEFENDANT: Not really. Really wide predic-
15 tions.

16 THE COURT: But he hasn't made any prediction
17 what sentence will be imposed?

18 THE DEFENDANT: No.

19 THE COURT: Have you been threatened or coerced
20 by anyone into entering a plea of guilty?

21 THE DEFENDANT: No.

22 THE COURT: Are you pleading guilty voluntarily
23 and of your own free will because you are guilty and
24 for no other reason?

25 THE DEFENDANT: Yes, Your Honor.

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2 THE COURT: Have you discussed your plea of guilty
3 fully with your attorney, Mr. Coiro?

4 THE DEFENDANT: Yes, I have.

5 THE COURT: Did you personally enter into any
6 discussions with Mr. Kimelman or anybody else in the
7 United States Attorney's Office?

8 THE DEFENDANT: No.

9 THE COURT: Do you know the maximum sentence which
10 may be imposed for each of these offenses?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: What is it?

13 THE DEFENDANT: Twenty years each count.

14 THE COURT: And there is also a fine that goes
15 with it. Do you understand that it's 20 years plus
16 \$10,000, let's look it up and make sure. It's \$5,000.
17 Twenty years plus a \$5,000 fine; do you understand that?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: These are all 2113(a)'s?

20 MR. COIRO: That's correct, Judge Platt.

21 THE COURT: How old are you?

22 THE DEFENDANT: Excuse me?

23 THE COURT: How old are you?

24 THE DEFENDANT: 33.

25 THE COURT: All right, having been advised as to

Transcript of Proceeding

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2 your constitutional rights, the nature of the charge
3 against you and the consequences of your plea, how do
4 you plead to count one in the indictment No. 76-CR-
5 190(s) which involves the taking on September 3rd,
6 1974, from the Roosevelt Savings Bank, guilty or not
7 guilty?

8 THE DEFENDANT: Guilty.

9 THE COURT: Having been advised as to your con-
10 stitutional rights and the nature of the charges
11 against you and the consequences of your plea, how do
12 you plead to count three of that indictment which
13 involves the taking on September 2nd, 1974, from the
14 Chase Manhattan Bank?

15 THE DEFENDANT: Guilty.

16 THE COURT: And having been advised as to your
17 constitutional rights, the nature of the charges
18 against you and the consequences of your plea, how do
19 you plead to count one of indictment No. 76-CR-471,
20 which involves the taking on October 17, 1975, in the
21 European American Bank?

22 THE DEFENDANT: Guilty, Your Honor.

23 MR. KIMELMAN: Your Honor, I would like to state
24 for the record at this time, so it is clear in front of
25 the defendant, that the United States will depart from

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2 its usual procedure of standing mute at sentencing and
3 take a position at the sentencing of this individual.

4 MR. COIRO: Mr. Kimelman--

5 MR. KIMELMAN: And I will also state for the record
6 we will recommend consecutive sentences.

7 THE COURT: You are aware of that?

8 MR. COIRO: Mr. Kimelman has made me aware of the
9 fact that he would make such a statement to Your Honor
10 on the date of sentence.

11 THE COURT: Given those facts do you wish to
12 change your mind in any way, Mr. Ferrara?

13 THE DEFENDANT: No, Your Honor.

14 THE COURT: You understand this is different than
15 their usual policy?

16 THE DEFENDANT: Yes, I do.

17 THE COURT: And you have no objection?

18 THE DEFENDANT: No.

19 THE COURT: All right, I find in each instance
20 there is a factual basis for the plea and accept the
21 plea of guilty to counts one and three of indictment
22 No. 76-CR-190 and count one of indictment No. 76-CR-
23 471.

24 Now, what is Mr. Ferrara's bail status?

25 MR. KIMELMAN: It is \$100,000 bail, secured by

75a
Transcript of Proceeding

16

1
2 deeds to three houses.

3 THE COURT: Did I set that bail?

4 MR. COIRO: Yes, Judge.

5 THE COURT: I can't remember it. But I guess so.
6 Are you sure it wasn't the magistrate?

7 MR. COIRO: No, Judge Platt. It was--in fact I
8 think it was more than \$100,000. It's about \$112,000.
9 We were here before Your Honor with his family, his
10 mom and dad and mother-in-law.

11 THE COURT: The bail will be continued.

12 MR. COIRO: Thank you, Judge Platt.

13 THE COURT: To the date of sentence. Now, Mr.
14 Ferrara, you should go with Mr. Coiro, if he's got time,
15 to the probation department and get your pre-sentence
16 work started because you will be notified about six
17 weeks hence when to return for sentencing.

18 You should cooperate with them to the extent you
19 and your attorney deem it advisable. Give them such
20 information they request so I can make a proper evalua-
21 tion with respect to sentence.

22 THE DEFENDANT: Yes, Your Honor.

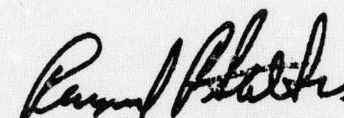
23 MR. COIRO: We will, Judge Platt. Thank you very
24 much, sir.

25 THE COURT: I'll tell Judge Weinstein you're ready

1
2 tomorrow to pick up on his other case.

3 (Whereupon, these proceedings were concluded.)
4
5

6
7 hereby certify the foregoing record
8 is true and accurate.
9

10 
11 RAYMOND P. STALKER
12
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77a
Transcript of Proceeding

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

JAN 13 1977

3
4 UNITED STATES OF AMERICA,

5 -against-

6 MICHAEL P. FERRARA,

7 Defendant.

76-CR-471
76-CR-190(s)

8
9 -----x
10
11 United States Courthouse
Brooklyn, New York

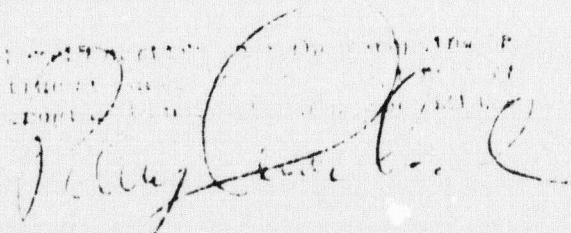
12 January 11, 1977
13 2:00 o'clock P.M.

14
15 B e f o r e :

16 HONORABLE THOMAS C. PLATT, U.S.D.J.

17
18
19
20 CRIMINAL CAUSE
FOR SENTENCING

21
22
23 PERRY AUERBACH
OFFICIAL COURT REPORTER

24
25


(15)

Transcript of Proceeding

Appearances:

2

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: STEVEN KIMMELMAN, ESQ.
Assistant United States Attorney

MICHAEL COIRO, ESQ.
Attorney for Defendant

Transcript of Proceeding

1 THE CLERK: Criminal cause for sentence, 3
2 United States versus Michael Ferrara.

3 MR. COIRO: Good afternoon, Judge Platt.

4 THE COURT: Good afternoon Mr. Coiro.
5 Welcome back, Mr. Kimmelman.

6 MR. KIMMELMAN: Thank you Judge. I wish I
7 could say it's nice to be back.

8 THE COURT: Well, Mr. Coiro, is there any
9 reason why we should not proceed with sentencing?

10 MR. COIRO: No legal cause, Your Honor.

11 THE COURT: I believe you had one allocution
12 in this matter, but I am not going to restrict you,
13 unless I have to say something more.

14 MR. COIRO: I don't believe we did, Your
15 Honor. The last time I just made an application to
16 Your Honor for an adjournment.

17 THE COURT: Maybe my recollection is faulty,
18 but I had some recollection of you going through your
19 statement and then my having a change of heart, but
20 maybe -- anyway, go ahead.

21 MR. COIRO: Fine, Judge Platt.

22 Judge Platt, I have had the opportunity to
23 read the Probation Report, as well as my client
24 Mr. Ferrara. I know that Probation Report, Your
25 Honor, Your Honor has read it, studied it, is a lot

1 more familiar with the details therein, and 4
2 I should say have studied it a lot more than I have.

3 I would just like to point out one or two
4 things to Your Honor, if I might.

5 Number one, Judge, I think the Probation
6 Report, this Defendant when he spoke to the Probation
7 Officer, fully and completely explained his partici-
8 pation in the crime that he's pleaded guilty to, and
9 the Probation Report will reflect, Your Honor, this
10 man started off with a rather serious drinking
11 problem. In fact, so much so that he was hospitalized
12 for it. As a result of that, he's straightened
13 himself out as far as his drinking problem is
14 concerned.

15 He also had a tremendous gambling problem
16 which is set forth in the Probation Report as well.

17 I can't tell you, Judge, that since his
18 problems here in the Eastern District he's more or
19 less putting his life together. He's in business
20 for himself. He's working hard. I have had the
21 opportunity to visit with Mr. Ferrara at his places
22 of business. I have seen the kind of hours that
23 he has put in.

24 I'm not for one moment going to try to justify
25 to Your Honor the acts that this Defendant has

1 committed, because needless to say, they are 5
2 serious crimes, and I know Your Honor is a fair-
3 minded person and is not only going to sentence
4 this Defendant taking into consideration his age,
5 his family, but also the community as well, and
6 as I stated to Your Honor I am not about to try to
7 justify, I wouldn't even attempt to.

8 This Defendant has pleaded guilty to three
9 20 year counts. He's made each and every appearance
10 before Your Honor. Even when Your Honor was about
11 to sentence him before the Christmas holiday.

12 He's appeared. He's never once tried to
13 shirk his responsibility. He knows Your Honor is
14 going to send him to prison. He expects it, and I
15 think at this stage of the game after conquering
16 the alcohol problem that he did, and now realizing
17 what his gambling problem has done, not only to
18 himself but to his family, I think, Judge, that
19 after a period of incarceration he will be able to
20 return to this community, to his wife, to his family,
21 and I think find a useful placement in the community.

22 As I stated, with his business, his brother-
23 in-law or his cousin is going to run his business
24 for him. He's made adequate preparations for his
25 family, and I do have to say that on behalf of the

1 United States Government, Mr. Kimmelman has 6
2 shown this Defendant some compassion and some
3 leniency in allowing him to plead to the counts that
4 he has pleaded to. I think, I would just like to
5 state this to Your Honor. Judge, one day I think
6 every lawyer would hope to expire and attain the
7 position that Your Honor has, but I'm frank enough
8 to say to Your Honor I'm glad you sit there today
9 and not me, because it's not a very pleasant task
10 for Your Honor to impose judgment upon his fellow
11 man.

12 I know that no judge relishes sending a man
13 to prison, but Your Honor's duty is clear, and I
14 know you will follow it, not because you like doing
15 it, and I don't know, Judge, whether or not incar-
16 ceration is the answer to it.

17 Mr. Ferrara certainly recognizes the position
18 he now finds himself in. He recognizes the wrong
19 that he's committed, and I just hope that Your Honor,
20 in his wisdom, and I would most respectfully and
21 humbly ask Your Honor with all the mercy you can
22 find, to maybe one day return this man to society
23 so that he can take his rightful place, and I would
24 ask Your Honor under all the circumstances and in
25 light of the seriousness of all the allegations,

Transcript of Proceeding

1 that Your Honor be as merciful as you possibly 7
2 can.

3 THE COURT: Do you wish to say something,
4 Mr. Ferrara?

5 THE DEFENDANT: Yes, Your Honor. I feel that
6 what Mr. Coiro said is definitely the truth. I
7 could never tell you how sorry I am for what I have
8 done. I know I am going to go and pay for it, and
9 I am going to try to do the best I can, wherever you
10 want to send me for the time I do.

11 THE COURT: Mr. Kimmelman?

12 MR. KIMMELMAN: Yes, Your Honor. Your Honor,
13 as part of the agreement with the Defendant to enter
14 the plea, the United States indicated on the record
15 that we would ask Your Honor to impose consecutive
16 sentences upon this Defendant.

17 As Your Honor knows, this is an unusual
18 position for the Government. We don't normally take
19 a position at a sentencing, but in this particular
20 case we have a defendant who with his co-defendant,
21 who already pled guilty, Mr. Savage and accepted a
22 plea agreement of 25 years, which was agreed to also
23 by Your Honor, we have an individual here where the
24 Government had evidence that he has committed --

25 THE COURT: I'm going to interrupt you. I

Transcript of Proceeding

1 don't recall agreeing to anything. I said 8
2 I would accept the plea and determine the sentence
3 independently.

4 MR. KIMMELMAN: I understand that, Your
5 Honor. But pursuant to Rule 11(e), the Court
6 technically went along with it, in any event, with
7 the agreement.

8 THE COURT: I thought Rule 11, not 11(e).

9 MR. KIMMELMAN: All right. But anyway, this
10 Defendant, rather than the Government, has evidence,
11 both scientific evidence and evidence of eyewitnesses
12 that this Defendant participated in 18 bank robberies
13 going from April of 1973 to January of 1976. This
14 indicated a concentrated and a continuing enterprise.

15 Each of the bank robberies were an armed
16 bank robbery. The total amount of money taken in
17 the bank robberies exceeded a half a million dollars.
18 None of the money has been recovered.

19 This Defendant has not in any shape or form
20 cooperated with the Government. There's been no
21 cooperation, neither as to the whereabouts of the
22 money, the existence of any possible accomplices
23 other than Mr. Savage and himself, and in short,
24 we have a Defendant who embarked on a three year
25 crime scheme of armed robberies, throughout this

1 district, with another individual, and then 9
2 ends up pleading to 3 out of the 18 banks in a plea
3 agreement which obviously takes in cognizance that
4 18 banks were robbed and only 3 are being pled to
5 and we have no cooperation and no recovery of the
6 funds.

7 It's the position of the Government, Your
8 Honor that this Defendant be sentenced to a minimum
9 of 25 years imprisonment, that he is at least as
10 culpable as his co-defendant with whom that the
11 Government reached an agreement of 25 years, and
12 that we would ask, therefore, that the minimum
13 sentence to be considered by Your Honor be 25 years,
14 and we would not feel that a sentence in excess of
15 25 years would be too severe in this case, as well.

16 MR. COIRO: Judge Platt, may I just briefly,
17 sir?

18 THE COURT: Yes.

19 MR. COIRO: Judge Platt, Mr. Kimmelman makes
20 reference to Mr. Savage. Your Honor sentenced Mr.
21 Savage, and I think that Your Honor will be able to
22 recall the background of Mr. Savage as compared to
23 the background of Mr. Ferrara, and Judge, again --
24 please, I'm not minimizing that which he's done, but
25 his background, Judge, this man, because of his

Transcript of Proceeding

1 problems, whether he was weak willed or what, 10
2 he was a petty car thief. His background in no
3 manner, shape or form comes near that of Savage,
4 plus the disparity in their ages as to Michael
5 Ferrara, as to his co-defendant in this case.

6 Judge, he's readily admitted his guilt. He's
7 not trying to hide anything as he stands before
8 Your Honor.

9 He tells you, Judge, "I did it. I'm going to
10 be punished. I know I am going to be punished."

11 I just ask Your Honor, maybe incarceration is
12 the answer to it, I don't know, Judge.

13 Maybe some day in the future people better
14 than Your Honor and myself, and our entire system
15 might find another way. I don't know if that's
16 the answer to it or not.

17 I expect Your Honor to send him to prison,
18 but I just ask Your Honor, let him see some daylight,
19 Judge. I'm positive -- and should he ever come out
20 and be returned to society, it's not that easy to
21 walk scotfree, Your Honor. There would be a hold
22 over him for a long, long time.

23 I genuinely and sincerely believe that Mr.
24 Ferrara has recognized what he's done here, and
25 he's going to have a lot of time to punish him, but

Transcript of Proceeding

1 if you must, you are the judge, you are on 11
2 the side of leniency --

3 THE COURT: Well, Mr. Coiro and Mr. Ferrara,
4 as you know, I have taken a considerable amount of
5 time over this sentence, and I granted your request
6 to at least not be sentenced before the holidays,
7 because as you anticipated I'm not left with much
8 choice in this matter. There is little, if anything,
9 apart from perhaps the background, and your man is
10 not without -- he doesn't have a pristine pure
11 background, but there's little to distinguish between
12 Mr. Savage and Mr. Ferrara, and the thing that I
13 can't get over is that the Government claims that
14 he participated in 18 other bank robberies. He
15 says there was only 12, but whether it was 12 or
16 18 bank robberies, armed bank robberies, is not much
17 that you can do for a man who has done that activity
18 over three years. For just one armed bank robbery
19 a substantial sentence might well be in order. For
20 12, well, what are you going to do, multiply it by
21 12? Adding it all together I felt I had no alterna-
22 tive but to do the same that I did for Mr. Savage.

23 So, it is adjudged on count one of indictment
24 76-CR-190(s) that the Defendant is hereby committed
25 to the custody of the Attorney General or his

Transcript of Proceeding

1 authorized representative for imprisonment 12
2 for a term of 18 years, and that Defendant shall
3 become eligible for parole under 18 USC Section
4 4205(b)(2) at such time as the Parole Commission
5 may determine, and the Defendant shall pay a fine
6 to the United States in the sum of \$3,000.00.

7 It adjudged on count three of indictment
8 76-CR-190(s) that the Defendant is hereby committed
9 to the custody of the Attorney General or his
10 authorized representative for imprisonment for a
11 term of 18 years, and that Defendant shall become
12 eligible for parole under 18 USC Section 4205(b)(2)
13 at such time as the Parole Commission may determine,
14 such sentence of imprisonment to run concurrently
15 with the sentence of imprisonment imposed under
16 count one; and the Defendant shall pay a fine to
17 the United States in the sum of \$5,000.00; and

18 It is adjudged on count one of indictment
19 76-CR-471 that the Defendant be hereby committed
20 to the custody of the Attorney General or his
21 authorized representative for imprisonment for a
22 term of 7 years, and that Defendant shall become
23 eligible for parole under 18 USC Section 4205(b)(2)
24 at such time as the Parole Commission may determine,
25 such sentence of imprisonment to run consecutively

1 with the sentences of imprisonment imposed 11
2 under counts one and three, and the Defendant shall
3 pay a fine to the United States in the sum of
4 \$5,000.00, for a total fine of \$15,000.00.

5 MR. KIMMELMAN: Your Honor, at this time
6 the Government moves to dismiss the remaining counts
7 against this Defendant in indictment 76-CR-190(a) and
8 76-CR-471 as previously agreed to.

9 THE COURT: Motion is granted.

10 MR. KIMMELMAN: And Your Honor, we will
11 also move to dismiss the underlying indictment,
12 76-CR-190 as to this Defendant.

13 THE COURT: Motion granted.

14 MR. COIRO: Thank you very much, Judge Platt.
15 (Whereupon these proceedings were concluded.)
16

17 * * * * *

Judgment Dated January 13, 1977

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH	DAY	YEAR
1	11	1977

COUNSEL
☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

M. Coiro, Esq.

(Name of counsel)

PLEA

☒ GUILTY, and the court being satisfied that there is a factual basis for the plea, ☐ NOLO CONTENDERE, in counts 1 and 3

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ JAN 13 1977 ★

TIME A.M.

FINDING & JUDGMENT

There being a finding/verdict of ☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C. Sec. 2113(a)(2) in that on or about Sept. 3, 1974, the defendant, knowingly & wilfully by force, violence and intimidation, did take from the presence of employees of the Roosevelt Savings Bank, Howard Beach, N.Y. approximately \$14,796, in U.S. currency and on or about Dec 2, 1974, the defendant, did knowingly & wilfully by force, take from the presence of employees of the Chase Manhattan Bank, Queens, N.Y., approximately \$7,443 in U.S. currency, which money was in the care, custody, control management and possession of said banks, the deposits of which were then and there insured by the Federal Deposit Insurance Corporation

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE OR PROBATION ORDER

IT IS ADJUDGED on count 1 of the indictment that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of eighteen (18) years and that defendant shall become eligible for parole under T-18 U.S.Code, Sec. 4205(b)(2) at such time as the Parole Commission may determine and the defendant shall pay a fine to the United States in the sum of \$5,000;

SPECIAL CONDITIONS OF PROBATION

IT IS ADJUDGED on count 3 of the indictment that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of eighteen (18) years and that defendant shall become eligible for parole under T-18 U.S.Code, Sec. 4205(b)(2) at such time as the Parole Commission may determine, such sentence of imprisonment to run concurrently with the sentence of imprisonment imposed under Count 1; and the defendant shall pay a fine to the United States in the sum of \$5,000; for a total of fines in the sum of \$10,000; and

91a
Judgment

On motion of Asst U.S. Attorney Kimelman the remaining counts and the underlying indictment are ordered dismissed.

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☐ U.S. District Judge

☐ U.S. Magistrate

Thomas C. Clitt

Date

Jan 13, 1977

17

Memorandum and Order Dated April 27, 1977

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ APR 27 1977 ★

TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA,

-against-

MICHAEL P. FERRARA,

Defendant.

76 CR 190(S)
76 CR 471

MEMORANDUM AND ORDER

April 27, 1977

-----x
PLATT, D.J.

Defendant, Michael P. Ferrara, has filed a motion requesting a reduction and/or modification of sentence, pursuant to Rule 35, Federal Rules of Criminal Procedure. He was sentenced by this Court on January 11, 1977, for violation of Title 18 U.S.C. §§ 2113(a) and 2, (bank robbery), to concurrent terms of eighteen (18) years on count one of 76 CR 190(S) and eighteen (18) years on count three of 76 CR 190(S) and fined \$5,000 on each of these two counts. In addition, the defendant was sentenced to a consecutive term of seven (7) years on count one of 76 CR 471 and fined \$5,000 for a total fine on all three counts of \$15,000.

The motion for a reduction and/or modification of sentence does not attack the legality of this Court's sentence, rather it "is essentially a plea for leniency and presupposes a valid conviction." U.S. v. Ellenbogen, 390 F.2d 537, 543 (2d Cir. 1968). This Court is granted broad discretion in reviewing such pleas. U.S. v. Jones, 444 F.2d 89 (2d Cir. 1971); U.S. v. Slutsky, 514 F.2d 1222 (2d Cir. 1975).

(16)

Memorandum and Order

2.

Furthermore, it is not incumbent upon this Court to state its reasons for denying a motion for reduction of a lawful sentence. U.S. v. Feliciano-Grafals, 309 F.Supp. 1292 (D.C. Puerto Rico 1970); U.S. v. Ursini, 296 F.Supp. 1152 (D.C. Conn. 1968). The Court, upon reviewing the facts of Mr. Ferrara's sentence, is not persuaded that the factors raised by defendant are sufficient to reduce or modify sentence under a Rule 35 motion.

The presentence report indicates that the defendant has admitted committing twelve other armed bank robberies. Moreover, he has an extensive prior record. The record in this case more than justifies the sentence imposed. Accordingly, it is

ORDERED, that defendant Ferrara's motion for reduction and/or modification of sentence, pursuant to Rule 35, Federal Rules of Criminal Procedure, is denied.

Thurman C. Kitt
U.S.D.J.

Memorandum and Order Dated September 20, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

SEP 20 1977 ★
TIME A.M. _____
P.M. _____

----- -X

MICHAEL P. FERRARA,

Petitioner,

MEMORANDUM AND
ORDER

-against-

UNITED STATES OF AMERICA,

September 20, 1977

Respondent.

----- -X

PLATT, D.J.

Petitioner has filed pro se a motion to vacate, set aside, or correct a sentence imposed upon him by this Court. Title 28 U.S.C. § 2255.

On March 15, 1976, petitioner was indicted on two counts of armed bank robbery (76 CR 190). Thereafter, a superseding indictment charging him with four counts of bank robbery (76 CR 190(S)), and an additional indictment charging him with six counts of bank robbery (76 CR 471) were also filed by the United States. On October 5, 1976, petitioner withdrew his previously offered pleas of not guilty to these charges and entered pleas of guilty to the first and third counts of superseding indictment 76 CR 190(S) and to the first count of indictment 76 CR 471, both of which charged violations of Title 18 U.S.C. § 2113(a). On January 11, 1977, he was sentenced to concurrent terms of eighteen (18) years on count one of 76 CR 190(S) and eighteen (18) years on count three of 76 CR 190(S) and fined \$5,000 on each of these two counts.

Memorandum and Order

2.

In addition, petitioner was sentenced to a consecutive term of seven (7) years on count one of 76 CR 471 and fined \$5,000 for a total fine on all three counts of \$15,000.

On April 27, 1977, the Court denied Ferrara's motion for a reduction of sentence pursuant to Rule 35, Federal Rules of Criminal Procedure.

Petitioner raises four arguments in this motion:

(i) his attorney had told him that he would receive less time than his co-defendant; (ii) the plea was entered "due to threats by the U.S. Attorney by/through counsel . . . that the Government would otherwise seek (18) charges" against him; (iii) the Court failed to inform him that he was entitled to a "severance and separate trials on all alleged (18) bank robberies"; and, (iv) his sentence was illegal because consecutive sentences cannot be imposed upon conviction on more than one offense for the same bank robbery. Petitioner asks that the Court conduct a hearing to consider these claims.

I

In this Circuit it has been continually held that an erroneous estimate by defense counsel of the sentence that will be imposed does not render a plea involuntary. United States ex rel. Hill v. Ternullo, 510 F.2d 844, 847 (2d Cir. 1975); United States ex rel. LaFay v. Fritz, 455 F.2d 297 (2d Cir.), cert. denied, 407 U.S. 923 (1972); United States ex rel. Bullock v. Warden, Westfield State Farm for Women, 408 F.2d 1326 (2d Cir. 1969), cert. denied, 396 U.S. 1043 (1970); United States v. Horton, 334 F.2d 153, 155 (2d Cir. 1964).

Memorandum and Order

3.

Moreover, the Supreme Court has said that great weight must be accorded solemn declarations in open court that a plea was not the product of such factors as misunderstanding, duress, or misrepresentation by others. Machibroda v. United States, 368 U.S. 487, 495-496 (1962).

Applying these standards to the facts of this case, it is clear that petitioner's first claim is without merit. Prior to accepting the plea, the Court informed the petitioner of each and every element enumerated in Rule 11 of the Federal Rules of Criminal Procedure. The relevant part of that colloquy was as follows:

"THE COURT: Have any promises of any kind, including any promise or suggestion as to what sentence will be imposed, been made to you by anyone in the United States Attorney's Office, other than that at the time of sentence the remaining counts of these two indictments will be dismissed?

THE DEFENDANT: No, Your Honor.

THE COURT: Have any promises of any kind, including any promises or suggestions as to what sentence will be imposed been made by your lawyer or by this Court or by anyone else to induce a plea of guilty from you?

THE DEFENDANT: No, Your Honor.

THE COURT: Has your lawyer expressed any opinion or made any prediction as to what sentence the Court will impose?

THE DEFENDANT: Predictions?

THE COURT: Yes?

THE DEFENDANT: Not really. Really wide predictions.

THE COURT: But he hasn't made any prediction what sentence will be imposed?

THE DEFENDANT: No.

Memorandum and Order

4.

THE COURT: Have you been threatened or coerced by anyone into entering a plea of guilty?

THE DEFENDANT: No."

Thus, petitioner's claim is directly contrary to his statements made at the time of the plea. Furthermore, assuming arguendo that his counsel did tell him that he would receive less time than his co-defendant, such a statement amounted to nothing more than a mere estimate and does not entitle petitioner to the relief requested.

A recent Supreme Court decision, Blackledge v. Allison, ___ U.S. ___, 45 U.S.L.W. 4435 (U.S. May 2, 1977), is distinguishable from the case at bar. In Blackledge, a defendant acknowledged that he understood that he could be imprisoned for a minimum of ten years to life and that noone had made promises or threats to influence him to plead guilty in response to two form questions. No transcript was made of the proceeding and the only record kept was a standard printed form filled in by the clerk and signed by Allison and the state court judge. The state court accepted the defendant's guilty plea. Allison thereafter filed a pro se habeas corpus petition alleging that his guilty plea was induced by an unkept promise of his attorney that he would only get a ten year sentence. Allison outlined exactly the terms of the alleged promise in his petition, including a description of when and where it was made and the identity of a witness to its communication. Neither his attorney nor the prosecutor were asked prior to the Court's accepting the plea to disclose any agreement that had been reached or sentencing recommendation

Memorandum and Order -

5.

that had been promised. In affirming the Court of Appeals decision that the petition should not have been dismissed by the District Court, the Supreme Court held that the petitioner's allegations were not so vague or conclusory as to warrant summary dismissal.

There are three significant distinctions between Blackledge and the case at bar. First, in this case a full transcript was kept of the guilty plea proceedings. The Supreme Court specifically distinguished cases where a transcript is maintained in stating (at p. 4439 n. 15):

" . . . this is not a case in which there is a record of the sentencing proceedings, see e.g. United States v. Tweedy, 419 F.2d 192 (CA9); Lynott v. United States, 360 F.2d 586 (CA2) . . . "

Second, in the case at bar the Court asked the petitioner whether any promises or suggestions as to the sentence the Court might impose had been made by his lawyer, the Court, or anyone else to induce a plea of guilty, to which petitioner responded in the negative. When the petitioner subsequently indicated that "really wide predictions" had been made, the Court sought and was given assurances by the petitioner that no such predictions had in fact been offered.

Third, petitioner herein has not set forth detailed factual allegations that impressed the Supreme Court in Blackledge. He has not established with sufficient specificity when or where the alleged promise was made, nor has he alleged

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that there were any witnesses to the promise.^{1/}

Furthermore, there are other facts surrounding this case which distinguish it from Blackledge and which further belie petitioner's claim. Petitioner and his co-defendant are suspected of having committed 22 bank robberies. Petitioner was identified by witnesses in 18 of those bank robberies and his fingerprints were found at 7 of them. A total of \$675,506.53 was taken from the 22 robberies and none of the money has ever been recovered. Petitioner himself had admitted participating in twelve of those robberies. In addition, petitioner has an extensive prior criminal record dating back to 1958 including convictions for attempted grand larceny and criminal possession of stolen property.^{2/}

^{1/} We find it also significant that petitioner has not submitted an affidavit from his attorney supporting his claim that such a statement was made. See Del Vecchio v. United States, ___ F.2d ___, Slip Op. 3719, 3730 (2d Cir. May 24, 1977).

^{2/} These facts are outlined in the petitioner's pre-sentence report and were not contested.

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This Court simply does not believe that this petitioner "was placed in a state of fear and confusion" by his retained attorney, nor could he have possibly been induced to plead guilty in the belief that he would receive a prison term of "far less time than that of the twenty five years" as he alleges. Moreover, the Court is well acquainted with the excellent reputation of Mr. Ferrara's attorney, Michael Coiro, Esq..

Finally, prior to the Court accepting the plea, the Assistant United States Attorney apparently anticipated that the petitioner might later seek to withdraw his plea and the following colloquy ensued:

"MR. KIMELMAN: Your Honor, I would like to state for the record at this time, so it is clear in front of the defendant, that the United States will depart from its usual procedure of standing mute at sentencing and take a position at the sentencing of this individual.

MR. COIRO: Mr. Kimelman--

MR. KIMELMAN: And I will also state for the record we will recommend consecutive sentences.

THE COURT: You are aware of that?

MR. COIRO: Mr. Kimelman has made me aware of the fact that he would make such a statement to Your Honor on the date of sentence.

THE COURT: Given those facts do you wish to change your mind in any way, Mr. Ferrara?

THE DEFENDANT: No, Your Honor.

THE COURT: You understand this is different than their usual policy?

THE DEFENDANT: Yes, I do.

THE COURT: And you have no objection?

THE DEFENDANT: No."

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It is again inconceivable, in light of this unusual departure from the standard practice of the United States Attorney's Office for this District, that petitioner's attorney told him that he would receive a sentence of substantially less than 25 years or that even if such a statement was made, petitioner relied upon it.

In summary, the Court finds that the allegations made by the petitioner in his first claim when viewed against the record of the plea and the surrounding circumstances are so "patently frivolous", Blackledge v. Allison, *supra*, at 4439, citing Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116, 119 (1956), as to warrant summary dismissal. See also Seiller v. United States, 544 F.2d 554, 567-568 (2d Cir. 1975).

Alternatively, the Court finds that any statement allegedly made by petitioner's attorney as to the sentence the Court might impose was merely an "estimate" and not a promise concerning the sentence. United States ex rel. Bullock v. Warden, Westfield State Farm for Women, *supra*.

II

Petitioner's second claim, that he was induced to plead guilty by threats of the Assistant United States Attorney that the Government would otherwise press eighteen other charges against him, is equally without merit. The mere fact that

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a guilty plea is induced by a prosecutor's promise with respect to plea arrangements does not render it involuntary. United States ex rel. Rosa v. Follette, 395 F.2d 721, 724 (2d Cir.), cert. denied, 393 U.S. 892 (1968). In order to constitute fear and coercion a petitioner must establish that he was subjected to "threats or promises of illegitimate action". (Emphasis added). Kent v. United States, 272 F.2d 795, 799 (1st Cir. 1959); Ford v. United States, 418 F.2d 855, 859 (8th Cir. 1969). In addition, the fact that a defendant pleads guilty to limit the possible penalty, as petitioner clearly did in this case, does not necessarily show the plea was not the product of a free and rational choice. North Carolina v. Alford, 400 U.S. 25, 31 (1970); United States ex rel. Delman v. Butler, 390 F.Supp. 606, 609 (E.D.N.Y. 1975). As we have indicated, there is substantial proof that the petitioner was involved in at least 18 of the 22 bank robberies and he admitted his participation in twelve of them. Thus, assuming such a "threat" was made, it was not made in bad faith and cannot be considered coercive.^{3/}

III

Petitioner's third claim, that the Court should have told him that "he was entitled to severance and separate trials on all alleged (18) bank robberies" pursuant to Rule 11, is somewhat puzzling.^{4/} As we have indicated, petitioner pled guilty to only three counts of bank robbery. Rule 11 requires

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that the defendant be informed and understand "the nature of the charge against him" (emphasis added). Rule 11(c)(1), Federal Rules of Criminal Procedure. The Court is unaware of any decision nor is there any rationale for holding that a defendant must be informed prior to pleading guilty of the nature of any other charges to which he is not pleading guilty and indeed in this case, for which he has not been formally charged.

Moreover, there is no requirement that a defendant be told of his "right" to a severance since there is no such right. Rule 14 of the Federal Rules of Criminal Procedure provides that if the Court determines that a defendant or the government would be prejudiced by a joinder of offenses or of defendants for trial, it may order a severance of defendants, or an election of separate trials of the counts. This rule is a restatement of the common law and Title 18 U.S.C. former § 557 that such relief is entirely within the discretion of the Court. Pointer v. United States, 151 U.S. 396 (1894). Accordingly, petitioner's third claim must be dismissed.

IV

Finally, petitioner's claim that his sentence was illegal in that consecutive sentences cannot be imposed upon conviction on more than one offense arising out of the same bank robbery is also meritless. To begin with, the consecutive sentences here were imposed for two separate bank robberies.

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While it has been held that a defendant cannot be convicted of or sentenced for both robbing a bank and possessing the robbery proceeds, Heflin v. United States, 358 U.S. 415 (1959),^{5/} there is no question but that consecutive sentences can be imposed upon conviction for several bank robberies. United States v. Koury, 319 F.2d 75 (6th Cir. 1963).^{6/}

For the foregoing reasons, petitioner's application to vacate, set aside, or correct the sentence previously imposed on him by this Court must be and the same hereby is, denied.

SO ORDERED.

Thomas C. Clift

U.S.D.J.

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FOOTNOTES

- 1/ We find it also significant that petitioner has not submitted an affidavit from his attorney supporting his claim that such a statement was made. See Del Vecchio v. United States, ___ F.2d ___, Slip Op. 3719, 3730 (2d Cir. May 24, 1977).
- 2/ These facts are outlined in the petitioner's pre-sentence Report and were not contested.
- 3/ Furthermore, as we have noted, the transcript of the plea reflects that petitioner denied he had been threatened into pleading guilty.
- 4/ The Second Circuit is perhaps equally puzzled with the procedural issue of whether a claim of a Rule 11 violation can be brought under § 2255 since it has not yet decided this question. Kloner v. United States, 535 F.2d 730, 734 (2d Cir. 1976). Although Blackledge v. Allison, *supra*, may well answer the question in the affirmative, we need not now decide the issue since we believe petitioner's claim is meritless.
- 5/ See also, United States v. Oliver, 523 F.2d 253, 260 (2d Cir. 1975) and cases cited therein.
- 6/ On August 25, 1977, the Court received a document entitled "petitioner's reply to government's memorandum of law in opposition to motion to withdraw plea of guilty" submitted by one Robert Augustus Harper, Jr. of Gainesville, Florida, raising for the first time two additional claims that the petitioner was not placed under oath prior to his plea and that there was an insufficient factual basis for the plea. The Court has not received any communication from the petitioner pro se indicating that he consents to the appearance of this attorney on his behalf. In addition, this attorney is not admitted to appear before this Court, nor has he made proper application to be admitted pro hac vice as is required by Local Rule 3(c), i.e., he has not been properly sponsored by any admitted counsel. See also, In re Michael Rapport, ___ F.2d ___, Slip Op. 4181, 4184 (2d Cir. June 14, 1977). We view such action as entirely improper. Moreover, as the record and the controlling authorities clearly establish, his claims are meritless.

Notice of Appeal Dated October 19, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK

MICHAEL FERRARA

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ NOV 17 1977 ★

Case No.

76-CR-190-S

76-471

Treated as Civ. 77-C1408

NOTICE OF APPEAL

COMES NOW, the Defendant/Petitioner MICHAEL P. FERRARA, by and through undersigned counsel and hereby appeals to the United States Court of Appeals for the Second Circuit, to review the Order of United States District Court, Eastern District of New York, bearing the date 20 September 1977, and to review the Order denying Defendant/Petitioner's Motion for Rehearing, dated 12 October 1977, and all parties to said cause are called upon to take notice of the entry of this Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to Steven Kimelman, Assistant U.S. Attorney, Eastern District of New York, 225 Cushman Plaza East, Brooklyn, New York 11201, by hand/mail this 19 day of October, A.D., 1977.

Respectfully submitted,

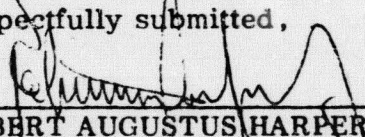
/s/ Robert Augustus Harper, Jr.
ROBERT AUGUSTUS HARPER, JR.
Counsel for Defendant/Petitioner
765 East University Avenue
P.O. Box 804
Gainesville, FL 32602
891/377-0735

Notice of Appeal Dated October 19, 1977

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to Steven Kimelman, Assistant U.S. Attorney, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, by ~~hand~~/mail this 14 day of November, A.D., 1977.

Respectfully submitted,



ROBERT AUGUSTUS HARPER, JR.
Counsel for Defendant/Petitioner
735 East University Avenue
P.O. Box 804
Gainesville, FL 32602
904/377-0735

(18)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MICHAEL FERRARA,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

**AFFIDAVIT
OF SERVICE**

STATE OF NEW YORK,
COUNTY OF NEW YORK ss.:

Conrad Dailey, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 177-21 106 Rd., Jamaica, New York

That on February 23, 1978, he served 1 copies of Appendix on David G. Trager
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Conrad Dailey.....

Sworn to before me this
23rd day of February, 1978.

John V. D'Esposito
JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 80-0932350
Qualified in Nassau County
Commission Expires March 30, 1979